

8-20-2008

In re Idaho Dept. of Water Resources Amnded Final Order Creating Water Dist. No. 170 Clerk's Record v. 4 Dckt. 35175

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Vol. 4 of 6

IN THE SUPREME COURT OF THE STATE OF IDAHO

LAW CL

IN RE: IDAHO DEPARTMENT OF WATER
RESOURCES AMENDED FINAL ORDER
CREATING WATER DISTRICT NO. 170

THOMPSON CREEK MINING COMPANY,

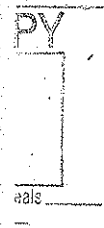
Petitioner/Appellant,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES

Respondent.

SUPREME COURT NO. 35175
Custer County Case No. CV-06-66



Appeal from: District Court of the Seventh Judicial District of the State of Idaho, in and for
the County of Custer.

Before the Honorable Brent J. Moss, District Judge.

ATTORNEY FOR PETITIONER/APPELLANT: Scot L. Campbell, Esq., and Dylan B.
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ATTORNEY FOR DEFENDANTS/RESPONDENTS: Phillip J. Rassier, Esq., P.O.
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Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov.

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

April 7, 2006

Re: Amended Final Order Creating Upper Salmon River Water District in
Administrative Basins 71 & 72

Dear Water Right Holder:

Enclosed please find a copy of the Amended Final Order Creating the Upper Salmon River Basin Water District No. 170. This Amended Final Order is issued in response to a petition of reconsideration that had been filed with the Director of the Idaho Department of Water Resources (IDWR) after issuance of the Final Order on March 6, 2006. Also enclosed is an informational sheet that explains options for responding to final orders.

The Amended Final Order revises and/or adds certain paragraphs to the Final Order but does not change the Director's decision from the Final Order regarding the creation of the Upper Salmon River Basin Water District No. 170. **The Amended Final Order does not change the status or scheduling of the Water District No. 170 annual meeting, which remains scheduled as follows:**

7:00 p.m., Tuesday, April 11, 2006
at the American Legion Memorial Building
221 Main St., Challis, Idaho

The water district meeting is necessary to elect a watermaster, consider selection of an advisory committee and adopt a budget for the operation of the district.

Please contact this office, the IDWR regional office in Twin Falls, or the Salmon Field Office in Salmon if you have any questions concerning this matter.

Sincerely,

Tim Luke
Manager, Water Distribution Section

Enclosures

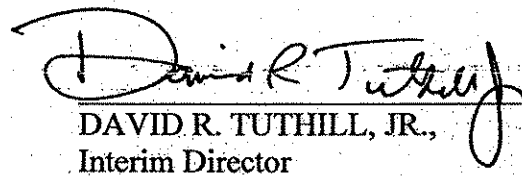
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO AND FOR THE COUNTY OF CUSTER

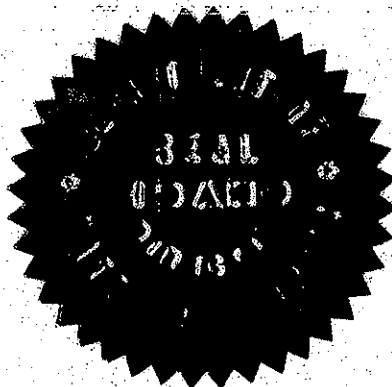
IN RE: IDAHO DEPARTMENT OF WATER)
RESOURCES AMENDED FINAL ORDER) AGENCY'S CERTIFICATE
CREATING WATER DISTRICT NO. 170) OF RECORD
_____)

STATE OF IDAHO)
County of Ada) ss

I, David R. Tuthill, Jr., Interim Director of the Idaho Department of Water Resources, do hereby certify that the above and foregoing record in the above-entitled matter was compiled and bound under my direction, and is a true and correct record of the pleadings, papers and proceedings therein as shown in the index to this record.

IN WITNESS WHEREOF, I have hereunto set by hand and affixed the seal of the Department of Water Resources at Boise, Idaho this 21 day of March, 2007


DAVID R. TUTHILL, JR.,
Interim Director

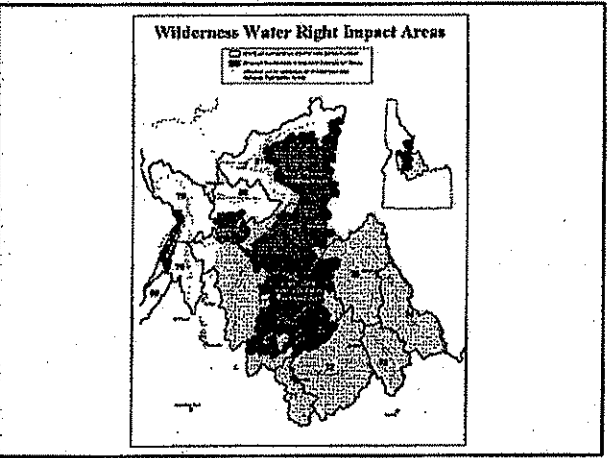


Wild & Scenic
Water Rights Agreement

Upper Salmon River Basin

Meeting with Upper Salmon
Water District Steering Committee
September 13, 2005
Challis, ID

- Background of Agreement
- 1997 SRBA Federal Reserved Rights Order
 - Fed Wilderness areas entitled to reserved rights for unappropriated flows
 - 1998 SRBA Wild & Scenic Decision
 - Mainstem Salmon W&S reach entitled to reserved right for unappropriated flows
 - 1999 Idaho Supreme Court Decision
 - Affirmed 1997 SRBA Decision



Background of Agreement

- October 1999: IDWR Moratorium
 - Affecting areas within and tributary to Wilderness areas (surface water & ground water)
- 2000 Idaho Supreme Court Decision
 - Water right reserved for Salmon W&S reach
 - Remanded to court for quantification
- 2004 Wild & Scenic River Stipulation

Agreement Summary Main Salmon

- Fed Reserved Instream Flow right subordinated to all rights upstream of Shoupe Gage with priority senior to 9/1/2003

Agreement Summary Main Salmon

- Fed Instream Flow right subordinated to 150 cfs of new development when flow at Shoup gage is less than 1,280 cfs
 - including up to 5,000 acres of irrigation

Agreement Summary
Main Salmon

- Fed Instream Flow right subordinated to additional 225 cfs of new development when flow at Shoup gage is greater than 1,280 cfs
 - including additional 10,000 acres of irrigation

Agreement Summary
Main Salmon

- Rights in first 150 cfs block not used in an entire year can be temporarily replaced by rights in second 225 cfs block
 - equal number of cfs and/or acres
 - based on priority date order

Agreement Summary
Main Salmon

- Processing of existing applications and appropriation of 150 cfs may take several years or more
- Until 150 cfs developed, all new rights may be delivered even if delivery diminishes Wild & Scenic River flows

Agreement Summary
Main Salmon

- W&S rights also subordinate to domestic, deminimus stockwater, non-consumptive, & instream flow rights
- Also subordinate to municipal rights, except new hookups with capacity of 2 cfs or more.

Agreement Summary
Main Salmon

- Diversions for new water rights must have:
 - a) Lockable controlling works
 - b) Measuring device
 - c) Data logger or other continuous monitoring & recording device for rate of flow

Agreement Summary
Main Salmon

- IDWR must establish Upper Salmon Water District
 - Objectives of District as per agreement
 - i) Collect and record diversion data
 - ii) Enforce water rights in priority
 - iii) Curtail unauthorized or excessive diversions

Agreement Summary
Upper Salmon Water District

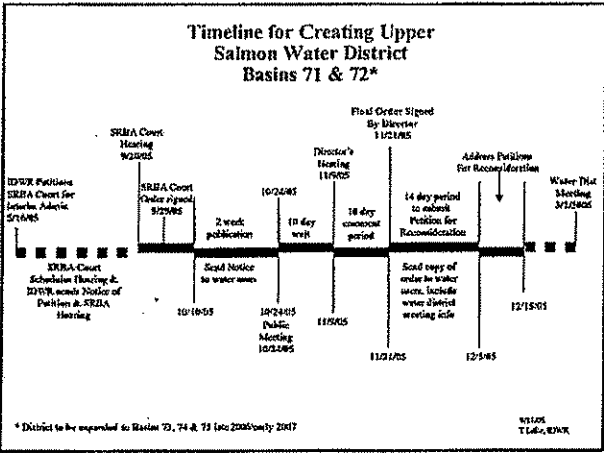
- Creation of one district for Upper Salmon
 - Initiate in Basins 71 & 72 six months after Fed rights are decreed
 - Existing water districts converted to sub-districts within USWD
 - Other sub-districts can be formed
 - Include surface water & ground water

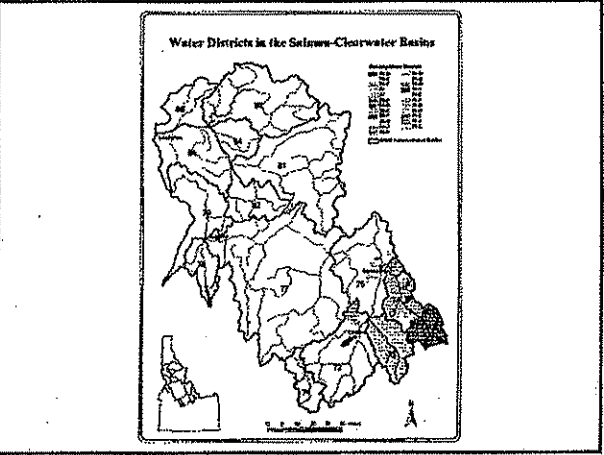
Stipulation Summary
Upper Salmon Water District

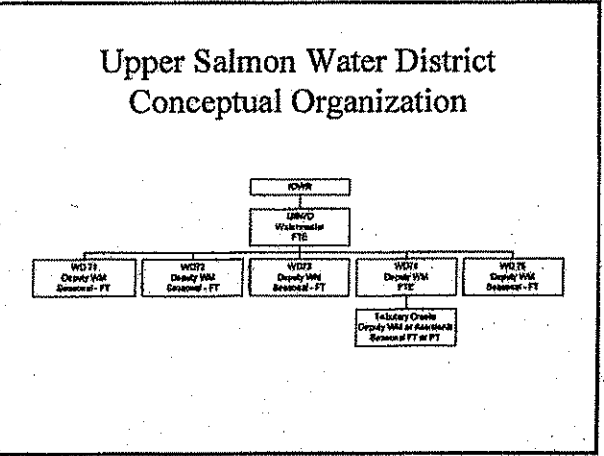
- Requirements of IDWR & Watermaster
 - a) Systematic inventory of diversions
 - b) Evaluate needs for sub-districts/deputy watermasters
 - c) Require measuring devices & headgates as needed
 - d) Regularly visit diversions & record measurements
 - e) Quarterly reporting of diversions (sw & gw)
 - f) Enforcement
 - g) Annual Reports & Budgets

Upper Salmon Water District
Timeline for Creation

- Petition SRBA Court in May, 2005
- SRBA Court Hearing (9/20/05)
- DWR Public Meeting & Hearing (Oct/Nov)
- District Annual Meeting: March, 2006 (limited to Basins 71 & 72)
- Add Basins 73, 74 & 75 in 2006-07, operational in 2007.



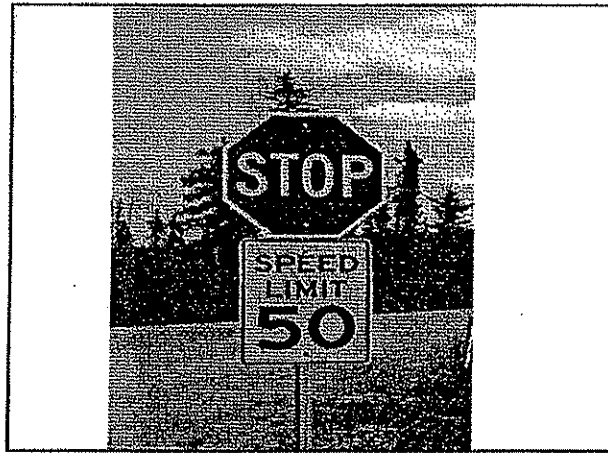




Upper Salmon Water District Organization Considerations
<ul style="list-style-type: none">• Governance/Advisory Committee• Budgeting/Assessments<ul style="list-style-type: none">- As one district or retain within sub-districts?• Staffing & Office• Watermaster requirements

Upper Salmon Water District Organization Considerations
<ul style="list-style-type: none">• Potential consolidation of tributary districts into one sub-district<ul style="list-style-type: none">- Potential for less personnel- Avoid duplication of efforts- Retain trib watermasters as seasonal staff


Upper Salmon Water District Organization Considerations
<u>Next Steps</u> <ul style="list-style-type: none">• Steering Committee• Public Meeting• Hearing



Creation of the
Upper Salmon Water District

Moving Forward with Creation
Timeline, District Organization,
& Watermaster Duties

Tim Luke, Manager
Water Distribution Section
Idaho Department of Water Resources
October 24, 2005
Challis, ID



Upper Salmon Water District
Timeline for Creation

- Petition SRBA Court in May, 2005
- SRBA Court Hearing: 9/20/2005
- IDWR Public Meeting: 10/24/2005
- IDWR Hearing: 11/9/2005

Upper Salmon Water District
Timeline for Creation

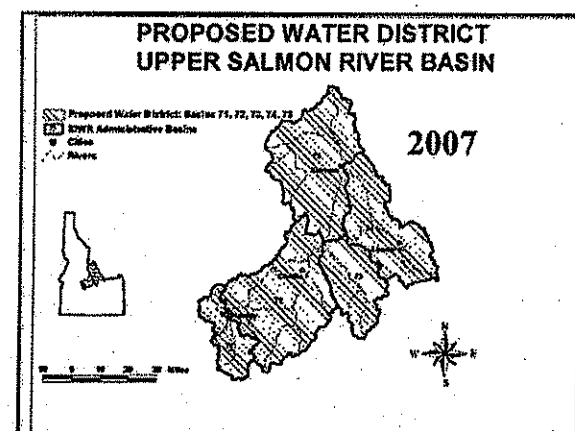
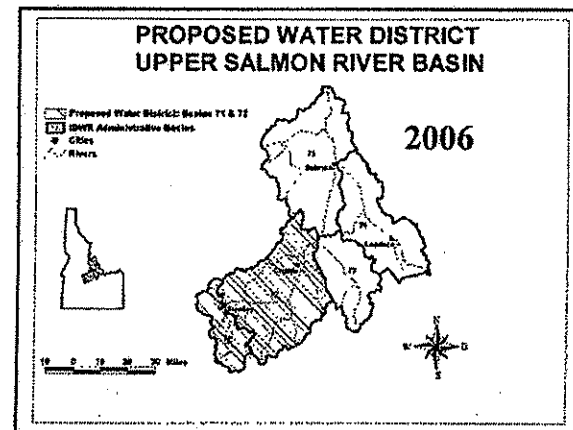
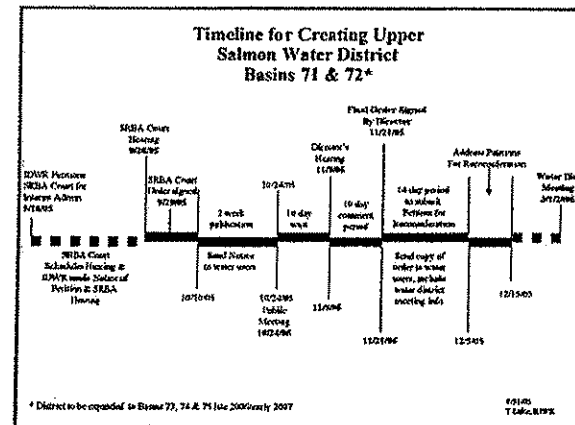
- District Annual Meeting: March, 2006
(limited to Basins 71 & 72)
- Add Basins 73, 74 & 75 in 2006-07,
operational in 2007.

PRINTOUT OF POWERPOINT PRESENTATION BY TIM LUKE AT INFORMATION MEETING OCTOBER 24, 2005

ADDENDUM

- 617 -

248



Upper Salmon Water District
Organization Considerations

Steering Committee Initiated

Two meetings held: 9/13/05 & 10/4/05

- Reps from all Upper Salmon basins
 - irrigation, cities, county, state, feds, & industrial interests
 - include reps from existing water districts

Upper Salmon Water District
Steering Committee

Basin 71: Jay Neider, Katie Breckenridge,
Cliff Hansen (Cnty Commissioner)

Basin 72: Jack Challis, Jim Hawkins, Gary
Chamberlain (IWRB), B Doughty

Basin 73: Ted O'Neal, Stan Dowton

Basin 74: Carl Ellsworth, James Whittaker,
Bruce Mulkey, Bob Loucks

Upper Salmon Water District
Steering Committee

Basin 75: Dave McFarland, Bill Gattung,
City of Salmon

State Reps: Sen. Don Burtenshaw
Rep. Lenore Barrett

Feds: Bob Kenworthy (USFS)
Al Bittner (BLM)

Upper Salmon Water District
Organization Considerations

Next Steering Committee Meeting: 11/14/05

- Open meetings, all participate
- Purpose of committee:
 - like a WD advisory committee
 - develop resolutions for annual meeting
 - governance & budget considerations

Upper Salmon Water District
Organization Considerations

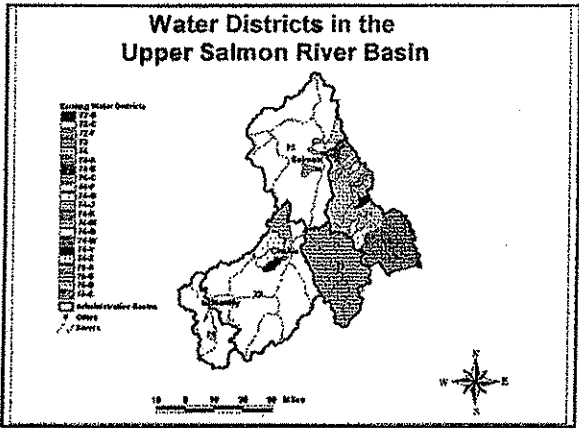
Committee Meeting Issues:

- W&S Agreement Requirements
- Organization of district
- Watermaster & watermaster duties
- Water measurement & reporting
- Regulation (meas devices & headgates)
- Resolutions & Budgets

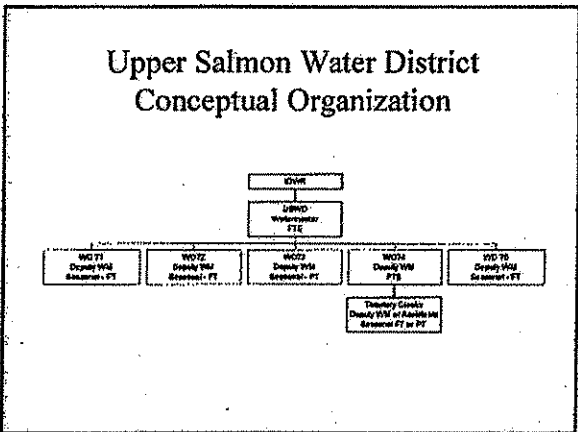
Upper Salmon Water District
Organization Considerations

Wild & Scenic Provisions:

- Convert existing water districts to sub-districts as appropriate
- Form other sub-districts as necessary



Basin Maps of
Hydrology &
Water Right
Divisions



Upper Salmon Water District
Watermaster Duties

What does umbrella watermaster do?

- Oversee sub-district watermasters
- Coordinate w/sub-districts on measurement & reporting procedures
- Collect diversion data from sub-districts
 - assures diversions are measured & reported
 - provide quality control

Upper Salmon Water District
Watermaster Duties

What does umbrella watermaster do?

- Measuring devices & headgates:
 - recommendations
 - compliance
 - calibration

Upper Salmon Water District
Watermaster Duties

What does umbrella watermaster do?

- Delivery & regulation of water rights
 - guidance/assistance to sub-districts
 - monitoring for excessive use, out-of-priority diversions
 - use or implement computer programs

Upper Salmon Water District
Watermaster Duties

What does umbrella watermaster do?

- Reporting
 - Quarterly diversion reports
 - Budget reports
- (includes annual use, assessments, & financial review)

Upper Salmon Water District
Watermaster Duties

What does umbrella watermaster do?

- Enforcement
 - assistance to sub-districts regarding illegal use and compliance issues
 - annual review of satellite imagery
- Training of sub-district watermasters

Upper Salmon Water District
Watermaster Duties

What does umbrella watermaster do?

- Water rights administration
 - address ownership issues
 - water right transfers/exchanges
 - assure diversion-water right links
 - GPS/identification of diversions

Upper Salmon Water District
Watermaster Duties

What does umbrella watermaster do?

- Representative of users
 - coordination with State, IDWR, Feds and local agencies
 - involvement w/Watershed Project on water right related projects

Upper Salmon Water District

Benefits of USWD & watermaster?

- Oversight
- Accountability
- Local expertise to sub-districts & users

Upper Salmon Water District

Some Requirements of District & Watermaster?

- Elect Watermaster, Advisory Committee & Treasurer
 - maintain financial accounts and review
 - budget: assessments & reports
 - comply w/employment requirements

Upper Salmon Water District

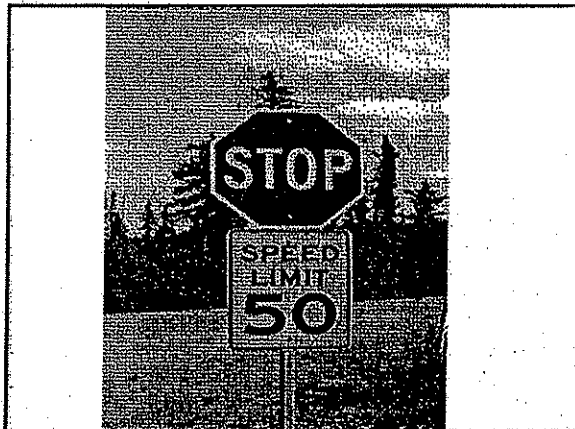
Some Requirements of District & Watermaster?

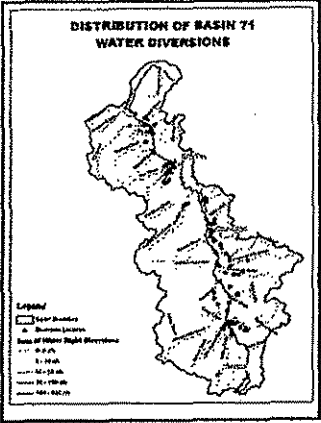
- Maintain office contact/presence
 - phone contact, access to standard equip
- Minimum PC & communication requirements
 - cell, fax, DSL or other broadband link
 - GIS/GPS software & experience
 - other PC experience

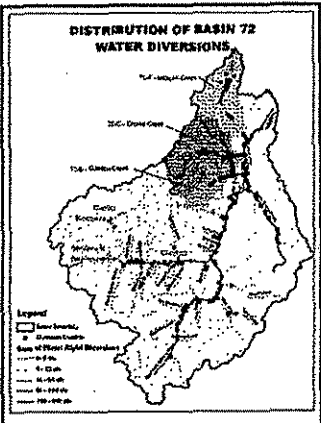
Upper Salmon Water District
Organization Considerations

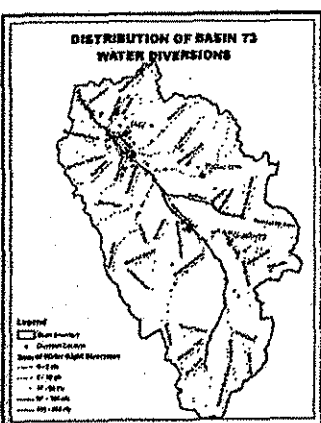
Next Steps

- Hearing on November 9th
- Continue Steering Committee meetings
 - draft resolutions for annual meeting
- Annual Meeting -- March 2006










Creation of the
Upper Salmon Water District

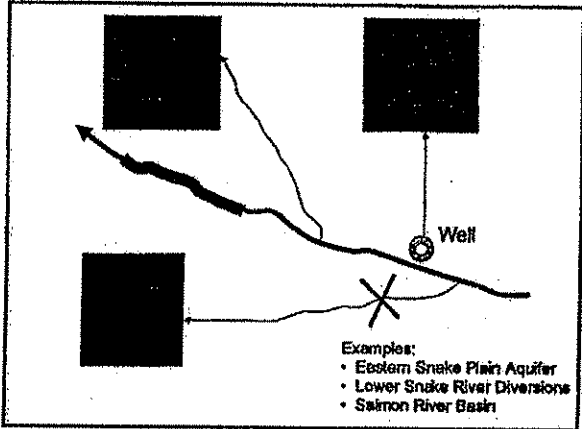
Background Information –
What Brought Us to This Point In
Water Distribution, and Why Do We
We Need to Go Further?

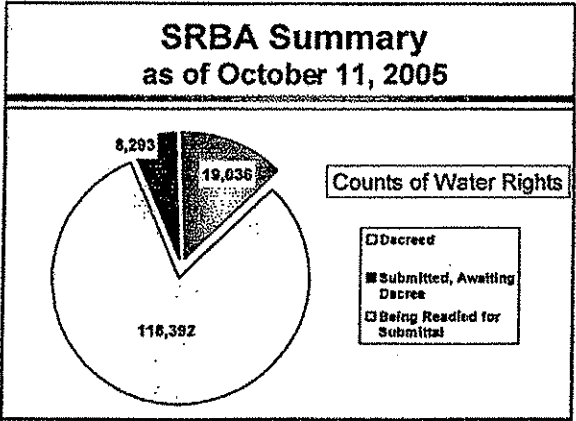
Presentation by
Dave Tuthill, Administrator,
Water Management Division
Idaho Department of Water Resources

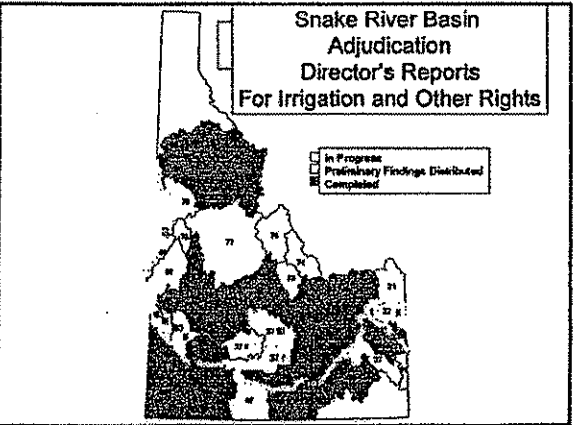


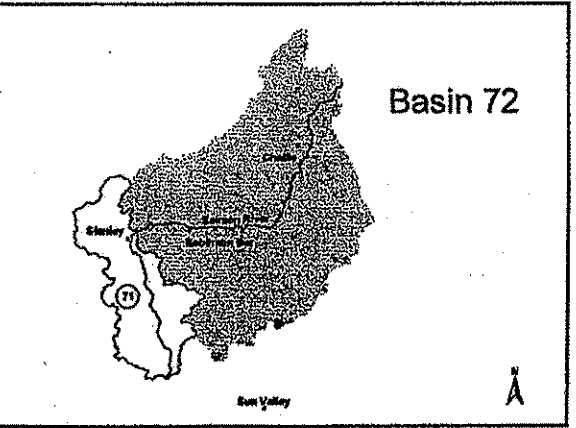
Discussion Items, Informational Meeting in
Challis, October 24, 2005

- In the beginning...
- Status of the SRBA
- Anadromous issues
- Wild and Scenic water rights
- Status of the Moratorium
- Standards for creating a new Water District
- Thoughts for the Future









Anadromous Issues

Anadromous Issues

- The Endangered Species Act provides powerful protections for anadromous species
- Diversions of water can impact anadromous species viability in certain stream reaches
- The Upper Salmon River Basin is a high profile area relative to anadromous species habitat
 - > Fish hatcheries on the Pahsimeroi and the Salmon
 - > Expanded federal presence in the basin

Wild and Scenic Water Rights

Options Facing Idaho

- Allow individuals and organizations to face takings issues on their own
- Enter into negotiations as between the State of Idaho and the Federal Government

Background of Agreement

- 1997 SRBA Federal Reserved Rights Order
 - Fed Wilderness areas entitled to reserved rights for unappropriated flows
- 1998 SRBA Wild & Scenic Decision
 - Mainstem Salmon W&S reach entitled to reserved right for unappropriated flows
- 1999 Idaho Supreme Court Decision
 - Affirmed 1997 SRBA Decision

Background of Agreement

- October 1999: IDWR Moratorium
 - Affecting areas within and tributary to Wilderness areas (surface water & ground water)
- 2000 Idaho Supreme Court Decision
 - Water right reserved for Salmon W&S reach
 - Remanded to court for quantification
- 2004 Wild & Scenic River Stipulation

Agreement Summary
Main Salmon

- Fed Reserved Instream Flow right subordinated to all rights upstream of Shoupe Gage with priority senior to 9/1/2003

Agreement Summary
Main Salmon

- Fed Instream Flow right subordinated to 150 cfs of new development when flow at Shoup gage is less than 1,280 cfs
 - including up to 5,000 acres of irrigation

Agreement Summary
Main Salmon

- Fed Instream Flow right subordinated to additional 225 cfs of new development when flow at Shoup gage is greater than 1,280 cfs
 - including additional 10,000 acres of irrigation

Agreement Summary
Main Salmon

- Rights in first 150 cfs block not used in an entire year can be temporarily replaced by rights in second 225 cfs block
 - equal number of cfs and/or acres
 - based on priority date order

Agreement Summary
Main Salmon

- Processing of existing applications and appropriation of 150 cfs may take several years or more
- Until 150 cfs developed, all new rights may be delivered even if delivery diminishes Wild & Scenic River flows

Agreement Summary
Main Salmon

- W&S rights also subordinate to domestic, deminimus stockwater, non-consumptive, & instream flow rights
- Also subordinate to municipal rights, except new hookups with capacity of 2 cfs or more.

**Agreement Summary
Main Salmon**

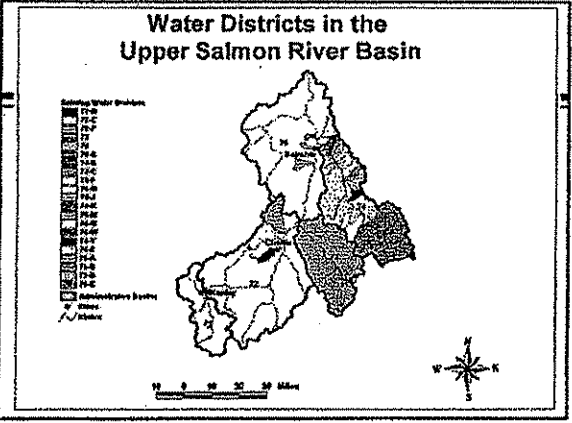
- Diversions for new water rights must have:
 - a) Lockable controlling works
 - b) Measuring device
 - c) Data logger or other continuous monitoring & recording device for rate of flow

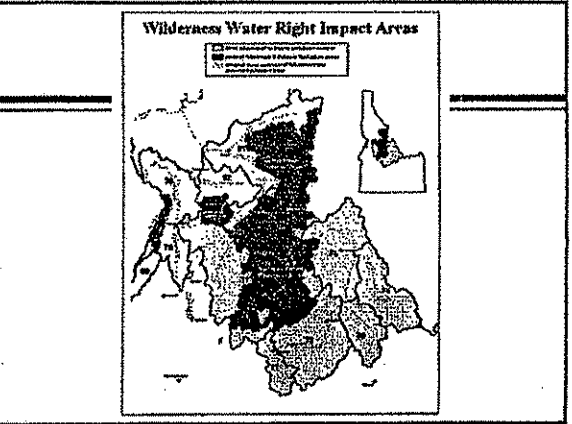
**Agreement Summary
Main Salmon**

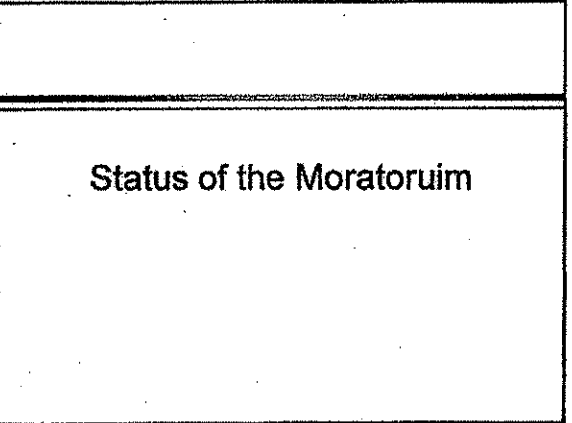
- IDWR must establish Upper Salmon Water District
 - > Objectives of District as per agreement
 - 1) Collect and record diversion data
 - 2) Enforce water rights in priority
 - 3) Curtail unauthorized or excessive diversions

**Agreement Summary
Upper Salmon Water District**

- Creation of one district for Upper Salmon
 - > Initiate in Basins 71 & 72 six months after Fed rights are decreed
 - > Existing water districts converted to sub-districts within USWD
 - > Other sub-districts can be formed
 - > Include surface water & ground water







**Moratoriums in the Upper
Salmon River Basin**

- Memo drafted to deal with Moratoriums
- Memorandum is being reviewed concurrently with water district creation

**Standards for Creating a New
Water District**

**Stipulation Summary
Upper Salmon Water District**

- Requirements of IDWR & Watermaster
 - a) Systematic Inventory of di versions
 - b) Evaluate need s for sub-districts/deputy watermaster s
 - c) Require measuring devices & headgates as needed
 - d) Regularly visit diversions & record measurements
 - e) Quarterly reporting of di versions (sw & gw)
 - f) Enforcement
 - g) Annual Reports & Budgets

Attorneys for Thompson Creek Mining Company

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Boise, Idaho 83701
Telephone (208) 345-2000
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18976

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE PROPOSED
CREATION OF A WATER DISTRICT IN THE
UPPER SALMON RIVER BASIN AREA IN
ADMINISTRATIVE BASINS 71 & 72

Case No. 39576

WRITTEN COMMENTS OF THOMPSON
CREEK MINING COMPANY

Scott L. Campbell of MOFFATT THOMAS BARRETT ROCK AND FIELDS, CHTD., on
behalf of Thompson Creek Mining Company ("Thompson Creek"), hereby submits the following
written comments.

I.
INTRODUCTION

On November 9, 2005, Karl J. Dreher, the Director ("Director") of the Idaho
Department of Water Resources ("IDWR") conducted a Public Hearing for Proposed Water
District for creation in the Upper Salmon River Basin Area in Administrative Basins 71 and 72.

SCANNED

APR 13 2006
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*All
page*

Thompson Creek owns decreed water rights which will be affected by the creation of the proposed water district. Therefore, it is an interested party with vested property rights which will be affected and has standing to comment upon and potentially contest the intended creation of the proposed water district.

This constitutes the written comments of Thompson Creek in response to the Idaho Department of Water Resources Public Hearing for Proposed Water District, conducted on November 9, 2005, in Challis, Idaho. These written comments are submitted in compliance with and pursuant to the applicable provisions of Idaho Code Section 42-604.

II. DISCUSSION

The statutory authority of the Director to create a water district is circumscribed in Idaho Code Section 42-604. As a public official of the State of Idaho, the Director possesses only those powers and authorities explicitly conferred by legislative enactment or as extended by reasonable clarifications of statutory authority in duly adopted rules and regulations.¹ *Beker Industries v. Georgetown Irrigation District*, 101 Idaho 187, 610 P.2d 546 (1980); I.C. § 42-603. Since the Director has not adopted rules or regulations concerning the creation of water districts, his authority is confined to the specific language of Idaho Code Section 42-604.

A. Idaho Code Section 42-604

The relevant provisions of Idaho Code Section 42-604 describe the procedural and substantive parameters for the creation of a water district by the Director. For the purposes of these comments, the initial portions of the statute which are relevant state:

The director may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry

¹ Additionally, the Director's authority is extended to include the applicable interpretations of the relevant statutes and rules or regulations by the Idaho Appellate Courts.

of an order *if such action is required in order to properly administer uses of the water resource*. Copies of the order shall be sent by regular mail to all holders of rights to the waters affected by the order. The director's order is subject to judicial review as provided in section 42-1701A, Idaho Code.

Id. (emphasis added).

Nothing in the administrative record created before or provided to the affected water users at the Public Hearing for Proposed Water District supports a determination by the Director that creation of the water district is "*required in order to properly administer uses of the water resource*." Nor could there be any legitimate administrative record justification for such a determination with respect to the water rights of Thompson Creek.

B. Thompson Creek – U.S. Forest Service Settlement

Thompson Creek has been a party to the Snake River Basin Adjudication Consolidated Subcase No. 75-13316, which produced the "SRBA Wild and Scenic Rivers Agreement between the United States and the State of Idaho" throughout the course of the litigation over the U.S. Forest Service water right claims for instream flow federal reserved water rights. Thompson Creek and the U.S. Forest Service settled their disputes in the Consolidated Subcase, as documented in the Stipulation and Joint Motion for Order Approving Stipulation and Dismissing Objections, dated May 29, 1998, (Exhibit A). This stipulation received a complete review by all of the parties to the Consolidated Subcase proceeding, and despite opposition to the settlement by the State of Idaho (the only objector to it), the SRBA District Judge issued an Order approving the stipulation on June 16, 1998, (Exhibit B).

The stipulation and the subsequent Order specifically subordinated any water rights ultimately obtained by the U. S. Forest Service to the water rights of Thompson Creek. See Stipulation, pp. 3-4; Order pp. 1-2, ¶ 2.

Following the conclusion of the Thompson Creek / U.S. Forest Service Settlement in June 1998, litigation continued among the remaining parties until the SRBA District Judge issued the Order Approving Stipulation and Entry of Partial Decrees on November 16, 2004, (Exhibit C), and the Amended Order Approving Stipulation and Entry of Partial Decrees on November 18, 2004, (Exhibit D). As this last Order makes clear, Thompson Creek did not sign and was not a party to the Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees (Exhibit E). In fact, Thompson Creek filed a timely objection to the Stipulation and Joint Motion which was resolved by agreement as to the form of the final Order.

See Exhibit D, p. 1. More importantly, this Order specifically provides:

2. The Stipulation is hereby approved, provided, that the provisions of paragraph 2 of the Stipulation ("paragraph 2") that address administration of water rights are covenants among the signatory parties only and shall not be binding on this Court or non-signatory parties with regard to administration of water rights by IDWR. The Court retains jurisdiction for the purpose of resolving disputes among the signatory parties regarding implementation and enforcement of the Stipulation. The provisions of paragraph 2 shall not affect the rights of Thompson Creek or any other non-signatory party to participate in and object to any motion for interim administration, proceeding for creation of a water district, or other administrative action or other judicial proceeding affecting their water rights or their use, diversion, or measurement of water; nor shall the provisions of paragraph 2 affect the disposition or review of such proceedings.

Id.

By virtue of these provisions, Thompson Creek believes that the Director can not reasonably or legally determine that the creation of the proposed water district is "*required in order to properly administer uses of the water resource.*" This is particularly true with regard to Thompson Creek's water rights, because of the specific subordination of the U.S. Forest Service instream flow water rights under the Thompson Creek / U.S. Forest Service Settlement

("Thompson Creek Settlement") and because of the clear language of the Court's Order, "nor shall the provisions of paragraph 2 affect the disposition or review of such proceedings."

Because of the subordination provisions of the Thompson Creek Settlement, no administration of the Thompson Creek water rights is necessary "*to properly administer uses of the water resource.*" No such administration was deemed necessary by the Director before the "SRBA Wild and Scenic Rivers Agreement between the United States and the State of Idaho." See Notice of Public Information Meeting and Hearing (Exhibit E).

Based upon the clear prohibition of the last sentence of paragraph 2 of the Order of November 18, 2004 (Exhibit D), the Director may not rely upon the terms of the so-called "SRBA Wild and Scenic Rivers Agreement between the United States and the State of Idaho," to justify a decision to create the proposed water district. See Exhibit E, p. 2. In fact, the only possible justification for the proposed action by the Director is that agreement. As a non-party with specifically reserved rights, pursuant to the SRBA District Court Order of November 18, 2004 (Exhibit D), Thompson Creek believes that the Director has no legally supportable basis for creation of the proposed water district. Such an action would violate that Order and would not be supportable under the statutory language of Idaho Code Section 42-604. This position is further supported by the testimony of all of the witnesses at the November 9, 2005 hearing, who uniformly stated that the existing water districts in the region were sufficient and there was no valid reason for the creation of the new "umbrella" water district proposed by the Director. See Transcript of Hearing (Exhibit F).

C. Notice Requirements of Idaho Code Section 42-604 Unsatisfied

As a separate basis for contesting the proposed creation of the water district, Thompson Creek believes the Director has failed to comply with the mandatory notice

requirements of Idaho Code Section 42-604. The statute requires that the notice for the proposed creation of a water district must "describe the proposed action to be taken, the reasons therefore [sic], the time and place of a hearing to be held concerning the proposed action. . ."

In view of the clear prohibition of the Order of November 18, 2004 (Exhibit D), precluding reliance of paragraph 2 of the Stipulation (Exhibit E) for creation of a water district, the Notice of Proposed Water District (Exhibit G) contains no legitimate explanation of the reasons for the proposed action. Consequently, the notice fails to comply with the specific requirements of Idaho Code Section 42-604, and is legally flawed.

III. CONCLUSION

The Director of the IDWR may exercise only the authority specifically granted by legislative enactment. That applies with particular force here, where a new water district is proposed which will impose greater costs for individual water right owners and duplicate existing water district administration in basins with existing districts. The statutory restrictions upon the Director's authority are even more important in view of the imposition of this new water district upon *non-parties* to the stipulation (Exhibit E), in apparent violation of the Order of November 18, 2004 (Exhibit D).

The Director has not satisfied the statutory requirements of Idaho Code Section 42-604 or the judicial limitations imposed upon his exercise of the authority granted by that provision. Consequently, under the present circumstances, based upon the existing administrative record and the applicable law, the Director can not legally create the proposed Upper Salmon River Basin Area Water District.

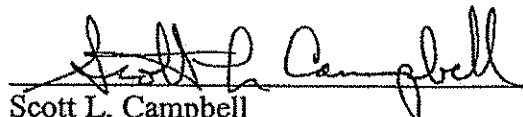
DATED this 18th day of November, 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2005, I caused a true and correct copy of the foregoing WRITTEN COMMENTS OF THOMPSON CREEK MINING COMPANY to be served by the method indicated below, and addressed to the following:

Karl Dreher, Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720
Fax: 208-287-6700

() U.S. Mail, Postage Prepaid
(x) Hand Delivered
() Overnight Mail
() Facsimile



Scott L. Campbell

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
18976.7

Attorneys for Thompson Creek Mining Company

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

IN THE MATTER OF CREATING THE
UPPER SALMON RIVER BASIN WATER
DISTRICT (DESIGNATED AS WATER
DISTRICT NO. 170)

THOMPSON CREEK MINING COMPANY,
Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV-2006-66

**OBJECTION TO ADMINISTRATIVE
RECORD LODGED BY THE
DEPARTMENT OF WATER
RESOURCES**

On March 21, 2007, the Department of Water Resources served upon Thompson
Creek Mining Company its *Notice of Lodging of Transcript and Record* in the above-referenced

matter. Pursuant to Idaho Rule of Civil Procedure 84(j), Thompson Creek hereby objects to the administrative record lodged by the Department because it omits several documents that are either directly relevant to, or that provide critical background and context regarding, the creation of Water District 170 ("WD170").

I. DISCUSSION

A. The Administrative Record Should Include Documents Related to the Federal Government's Wild & Scenic Rivers Act Water Right Claims in the Snake River Basin Adjudication.

The administrative record in this case should include certain documents from the previous legal proceeding that addressed water right claims filed in the Snake River Basin Adjudication (the "SRBA") by the federal government based on the Wild & Scenic Rivers Act. The Department has stated on numerous occasions that WD170 was formed in order to implement the agreement between the federal government, the state of Idaho, and various other parties that purported to resolve the disputes over those claims. Accordingly, certain documents from that proceeding provide background and context that is critical to an understanding of the current dispute over the formation of WD170.

In the SRBA, the federal government filed several claims to instream flow water rights that it asserted were reserved to it by the federal Wild & Scenic Rivers Act. *See, e.g.*, Exhibits A and B. Several parties, including Thompson Creek, objected to these claims, and these claims and objections became the subject of consolidated subcase 75-13316 in the SRBA. *See, e.g.*, Exhibits C and D. On August 20, 2004, the federal government, the state of Idaho, and several of the objectors settled this dispute over the Wild & Scenic Rivers Act claims in a stipulation that became known as the Wild & Scenic Rivers Agreement. *See* Exhibit N. This Agreement was approved by the SRBA district court on November 18, 2004. *See* Exhibit R.

And, paragraph 2(b) of that Agreement states that the Department is required to create a new water district in Basins 71 and 72. Exhibit N at 3-4.

The administrative record lodged by the Department demonstrates that WD170 was created in order to implement the Wild & Scenic Rivers Agreement and its water district provision. *See, e.g.*, R. at 57, 59, 65. Due to this direct relationship between the Wild & Scenic Rivers Agreement and the creation of WD170, documents related to the Agreement and the federal Wild & Scenic Rivers Act water right claims should be included in the administrative record. Without them and the background and context that they provide, a full understanding of the issues in the current proceeding will not be possible.

Importantly, Thompson Creek does not suggest that all documents from consolidated subcase 75-13316 should be included in the administrative record. Rather, Thompson Creek believes that the following documents, which are attached to this Objection as Exhibits, are sufficient to provide the necessary background and context:

1. *Notice of Claim to a Water Right Reserved Under Federal Law (Amended)*, by the United States of America (Water Right No. 75-13316) (undated) (Exhibit A).
2. *Notice of Claim to a Water Right Reserved Under Federal Law (Amended)*, by the United States of America (Water Right No. 77-11941) (undated) (Exhibit B).
3. *Objection*, by Thompson Creek Mining Company (Water Right No. 75-13316, Oct. 11, 1995) (Exhibit C).
4. *Objection*, by Thompson Creek Mining Company (Water Right No. 77-11941, Oct. 11, 1995) (Exhibit D).
5. *Motion to File Amended Notice of Claim*, by the United States of America (Subcase No. 75-13316, Feb. 26, 1997) (Exhibit E).
6. *United States' Motion for Partial Summary Judgment on Its Claims to Federal Reserved Water Rights for Wild and Scenic Rivers* (Consolidated Subcase No. 75-13316, Jan. 15, 1998) (Exhibit F).

7. *United States' Memorandum in Support of its Motion for Partial Summary Judgment on Its Claims to Federal Reserved Water Rights for Wild and Scenic Rivers* (Consolidated Subcase No. 75-13316, Jan. 15, 1998) (Exhibit G).
8. *Thompson Creek's Memorandum in Response to United States' Motion for Partial Summary Judgment on its Federal Reserved Water Rights Claims for Wild and Scenic Rivers* (Consolidated Subcase No. 75-13316, Feb. 27, 1998) (Exhibit H).
9. *The United States' Consolidated Reply Memorandum In Support of Its Motion for Partial Summary Judgment On Its Claims to Federal Reserved Water Rights For Wild and Scenic Rivers* (Consolidated Subcase No. 75-13316, April 1, 1998) (Exhibit I).
10. *Stipulation and Joint Motion for Order Approving Stipulation and Dismissing Objections*, by the United States of America and Thompson Creek Mining Company (Consolidated Subcase Nos. 63-25239, 75-13316 and 75-13605, May 29, 1998) (Exhibit J).
11. *Order Approving Stipulation and Dismissing Objections* (Consolidated Subcase Nos. 63-25239, 75-13316 and 75-13605, June 16, 1998) (Exhibit K).
12. *Memorandum Decision Granting, In Part, and Denying, In Part, the United States' Motion for Summary Judgment on Reserved Water Rights Claims* (Consolidated Subcase No. 75-13316, July 27, 1998) (Exhibit L).
13. *Potlatch Corporation and Hecla Mining. v. United States of America* (Idaho Supreme Court, 2000 Opinion No. 106, Oct. 27, 2000), or *Potlatch Corporation v. United States*, 12 P.3d 1256 (Idaho 2000) (Exhibit M).
14. *Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees*, between the United States of America, the State of Idaho, *et al.* (Consolidated Subcase No. 75-13316, Aug. 20, 2004) (*i.e.*, the Wild & Scenic Rivers Agreement) (Exhibit N).
15. *Thompson Creek Mining Company's Objection to Proposed Settlement Agreement* (Consolidated Subcase No. 75-13316, Oct. 14, 2004) (Exhibit O).
16. *Memorandum in Support of Thompson Creek Mining Company's Objection to Proposed Stipulation* (Consolidated Subcase No. 75-13316, Oct. 14, 2004) (Exhibit P).

17. *Order Approving Stipulation and Entry of Partial Decrees* (Consolidated Subcase No. 75-13316, Nov. 16, 2004) (Exhibit Q).
18. *Amended Order Approving Stipulation and Entry of Partial Decrees* (Consolidated Subcase No. 75-13316, Nov. 18, 2004) (Exhibit R).

B. The Administrative Record Should Include Additional Documents Related to the WD170 Steering Committee.

The record lodged by the Department already contains a number of documents related to the steering committee that was formed by the Department and local water users to provide input on the formation of WD170. However, it appears that the Department has omitted a number of other documents from the same general time period that are also relevant to the WD170 steering committee. Thompson Creek believes the following documents, which are included as Exhibits to this Objection, should be included in the administrative record:

19. *Letter from Tim Luke Re: Announcement of Meeting With Existing State Water Districts in the Upper Salmon River Basin to Discuss the Wild and Scenic Rivers Water Rights Agreement and Establishing a New Water District in the Upper Salmon River Basin* (Feb. 9, 2005) (Exhibit S): This letter was sent to watermasters, secretaries, and advisory committee members of already existing water districts within WD170. It contains detailed discussions of the background and purpose of WD170 and is therefore relevant to this proceeding.
20. *Letter from Tim Luke Re: Upper Salmon Water District Steering Committee* (June 17, 2005) (Exhibit T): This letter was sent to certain water users in Basins 71, 72, 73, 74, and 75 as an invitation to join the WD170 steering committee. It also contains helpful discussions of the background and purposes of the formation of WD170 and is therefore relevant to this proceeding.
21. *Wild & Scenic Water Rights Agreement: Upper Salmon River Basin* (Sept. 13, 2005) (Exhibit U): This is a printout of a PowerPoint slideshow that was presented at the September 13, 2005 WD170 advisory committee meeting and that was also apparently included as an enclosure to a letter of September 27, 2005 from Tim Luke to members of the committee. R. at 59, 68-88.

C. The Administrative Record Should Include These Other, Miscellaneous Documents.


For the reasons described below, Thompson Creek believes the following

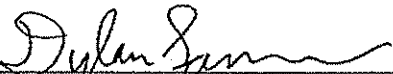
documents should also be included in the administrative record:

22. *Written Comments of Thompson Creek Mining Company* (Nov. 18, 2005) (without exhibits)¹ (Exhibit V hereto): This was submitted directly to the Director after the November 9, 2005, hearing on the creation of WD170, but also well before both the *Final Order Creating Water District No. 170* that was issued on March 8, 2006, and the *Amended Final Order Creating Water District No. 170* that was issued on April 7, 2006. As such, this submission constitutes "evidence received or considered" that Idaho Code Section 67-5249(2)(b) requires to be included in the administrative record.
23. As the *Notice of Information Meeting and Hearing* of October 7, 2005, indicates, the Department held a public information meeting in Challis on October 24, 2005, to discuss the creation of WD170 in anticipation of the November 9, 2005, hearing. To the extent that there are any minutes, transcripts, or other documents describing that meeting, such documents should be included in the administrative record.
24. The record reflects that Department representatives presented a slide show at the public information meeting of October 24, 2005. A hard copy of that slide show presentation should be included in the administrative record.

DATED this 3rd day of April, 2007.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Scott L. Campbell – Of the Firm

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Thompson Creek Mining
Company

¹ All exhibits to the *Written Comments* appear elsewhere in the Department's administrative record and are accordingly not included with this *Objection*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of April, 2007, I caused a true and correct copy of the foregoing OBJECTION TO ADMINISTRATIVE RECORD LODGED BY THE DEPARTMENT OF WATER RESOURCES to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
Idaho Water Center
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

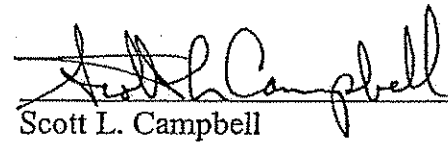
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Phillip J. Rassier
Chris M. Bromley
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
Idaho Water Center
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☐ Facsimile

Reed W. Larsen
COOPER & LARSEN
151 North 3rd Avenue, 2nd Floor
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Pocatello, ID 83205-4229
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☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile


Scott L. Campbell

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN RE: IDAHO DEPARTMENT OF WATER)
RESOURCES AMENDED FINAL ORDER)
CREATING WATER DISTRICT NO. 170)

THOMPSON CREEK MINING COMPANY,

Petitioner,)

VS.)

IDAHO DEPARTMENT OF WATER RESOURCES,)
an agency of the State of Idaho,)

Respondent.)

ORDER SETTLING
AGENCY TRANSCRIPT
AND RECORD

The Idaho Department of Water Resources (IDWR) served its *Notice of Lodging of Transcript and Record* in this matter upon the parties on March 21, 2007, pursuant to I.R.C.P. 84(j). On April 4, 2007, the Petitioner, Thompson Creek Mining Co. (Thompson Creek) filed a timely *Objection to Administrative Record Lodged by the Department of Water Resources (Objection)*. No objection was made to the transcript of the agency hearing. The *Objection* requests that the following documents be added to the record:

1. *Notice of Claim to a Water Right Reserved Under Federal Law (Amended)*, by the United States of America (Water Right No. 75-13316) (undated) (Exhibit A to *Objection*)
2. *Notice of Claim to a Water Right Reserved Under Federal Law (Amended)*, by the United States of America (Water Right No. 77-11941) (undated) (Exhibit B to *Objection*)
3. *Objection*, by Thompson Creek Mining Company (Water Right No. 75-13316, Oct. 11, 1995) (Exhibit C to *Objection*).

4. *Objection*, by Thompson Creek Mining Company (Water Right No. 77-11941, Oct. 11, 1995) (Exhibit D to *Objection*).
5. *Motion to File Amended Notice of Claim*, by the United States of America (Subcase No. 75-13316, Feb. 26, 1997) (Exhibit E to *Objection*).
6. *United States' Motion for Partial Summary Judgment on Its Claims to Federal Reserved Water Rights for Wild and Scenic Rivers* (Consolidated Subcase No. 75-13316, Jan. 15, 1998) (Exhibit F to *Objection*).
7. *United States' Memorandum in Support of its Motion for Partial Summary Judgment on Its Claims to Federal Reserved Water Rights for Wild and Scenic Rivers* (Consolidated Subcase No. 75-13316, Jan. 15, 1998) (Exhibit G to *Objection*).
8. *Thompson Creek's Memorandum in Response to United States' Motion for Partial Summary Judgment on its Federal Reserved Water Rights Claims for Wild and Scenic Rivers* (Consolidated Subcase No. 75-13316, Feb. 27, 1998) (Exhibit H to *Objection*).
9. *The United States' Consolidated Reply Memorandum in Support of Its Motion for Partial Summary Judgment on Its Claims to Federal Reserved Water Rights for Wild and Scenic Rivers* (Consolidated Subcase No. 75-13316, April 1, 1998) (Exhibit I to *Objection*).
10. *Stipulation and Joint Motion for Order Approving Stipulation and Dismissing Objections*, by the United States of America and Thompson Creek Mining Company (Consolidated Subcase Nos. 63-25239, 75-13316 and 75-13605, May 29, 1998) (Exhibit J to *Objection*).
11. *Order Approving Stipulation and Dismissing Objections* (Consolidated Subcase Nos. 63-25239, 75-13316 and 75-13605, June 16, 1998) (Exhibit K to *Objection*).
12. *Memorandum Decision Granting, In Part, and Denying, In Part, the United States' Motion for Partial Summary Judgment on Reserved Water Rights Claims* (Consolidated Subcase No. 75-13316, July. 27, 1998) (Exhibit L to *Objection*).
13. *Potlatch Corporation and Hecla Mining v. United States of America* (Idaho Supreme Court, 2000 Opinion No. 106, Oct. 27, 2000), or *Potlatch Corporation v. United States*, 12 P.3d 1256 (Idaho 2000) (Exhibit M to *Objection*).
14. *Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees*, between the United States of America, the State of Idaho, *et al.* (Consolidated Subcase No. 75-13316, Aug. 20, 2004) (i.e., the Wild & Scenic rivers Agreement) (Exhibit N to *Objection*).
15. *Thompson Creek Mining Company's Objection to Proposed Settlement Agreement* (Consolidated Subcase No. 75-13316, Oct. 14, 2004) (Exhibit O to *Objection*).

16. *Memorandum in Support of Thompson Creek Mining Company's Objection to Proposed Stipulation* (Consolidated Subcase No. 75-13316, Oct. 14, 2004) (Exhibit P to *Objection*).
17. *Order Approving Stipulation and Entry of Partial Decrees* (Consolidated Subcase No. 75-13316, Nov. 16, 2004) (Exhibit Q to *Objection*).
18. *Amended Order Approving Stipulation and Entry of Partial Decrees* (Consolidated Subcase No. 75-13316, Nov. 18, 2004) (Exhibit R to *Objection*).
19. *Letter from Tim Luke Re: Announcement of Meeting With Existing State Water Districts in the Upper Salmon River Basin to Discuss the Wild and Scenic Rivers Water Rights Agreement and Establishing a New Water District in the Upper Salmon River Basin* (Feb. 9, 2005) (Exhibit S to *Objection*).
20. *Letter from Tim Luke Re: Upper Salmon Water District Steering Committee* (June 17, 2005) (Exhibit T to *Objection*).
21. *Wild & Scenic Water Rights Agreement: Upper Salmon River Basin* (Sept. 13, 2005, printout of PowerPoint slideshow) (Exhibit U to *Objection*).
22. *Written Comments of Thompson Creek Mining Company* (Nov. 18, 2005) (without exhibits) (Exhibit V to *Objection*).
23. Any minutes, transcripts, or other documents describing the public information meeting held by the Department in Challis, Idaho on October 24, 2005, as announced in the *Notice of Information Meeting and Hearing* of October 7, 2005.
24. A hard copy of the slide show presentation made by Department representatives at the public information meeting of October 24, 2005, in Challis.

In response to Thompson Creek's *Objection*, item 21 (printout of PowerPoint presentation by Tim Luke at meeting in Challis on Sept. 13, 2005), item 22 (*Written Comments of Thompson Creek Mining Company* received Nov. 18, 2005) and item 24 (printouts of two PowerPoint presentations made by Tim Luke and Dave Tuthill at Information Meeting conducted October 24, 2005) identified above shall be added as an addendum to the compilation of the agency record in this matter for review pursuant to I.R.C.P. 84(j). In response to request item 23 above, no other minutes, transcripts or other documents, in addition to the PowerPoint

presentation (item 24) exist which describe the Information Meeting of October 24, 2005, other than as may be reflected in the transcript of the agency's public hearing held on November 9, 2005.

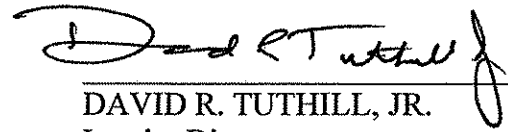
Items 1 through 20, identified above, were not made a part of the agency record in this matter before IDWR and were not part of the record considered by the Director in issuing the *Final Order Creating Water District No. 170* on March 8, 2006. Consequently, these documents do not comprise a part of the agency record in this matter and should not be included in the agency record for judicial review. *See* Idaho Code §§ 67-5249(2) and (3), and 67-5275. *See also* I.R.C.P. 84(e) ("judicial review of agency action shall be based upon the record created before the agency"). Thompson Creek asserts in its *Objection* that the excluded documents provide necessary background and context critical to an understanding of the current dispute or that the documents are otherwise relevant to the agency proceeding. While the proffered documents may well have been accepted into the record on this basis while the hearing record was still open, "background and relevancy" are not a basis for adding documents not considered below to the record on judicial review. Judicial review is limited to the record created before the agency. Idaho Code § 67-5249(3) (agency record constitutes exclusive basis for agency action or judicial review thereof); I.R.C.P. 84(e).

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. No objection having been made to the agency transcript in this matter, the transcript is deemed settled. Timely objections having been made to the agency record, the record is settled with the changes identified below.
2. Based on the foregoing discussion, the documents described in items 1 through 20 in Thompson Creek's *Objection* are not documents made a part of the record during the agency proceeding and therefore shall not be included as part of the agency record considered below for purposes of judicial review.

3. Based on the foregoing discussion, the documents described in items 21, 22 and 24 of Thompson Creek's *Objection* are documents treated as part of the record during the agency proceeding and therefore shall be included in an addendum to the compilation of the agency record for purposes of judicial review. No documents exist satisfying the description in item 23 of Thompson Creek's *Objection*.
4. Pursuant to Idaho Rule of Civil Procedure 84(j), Thompson Creek's *Objection*, this Order and all documents attached to the *Objection* are to be forwarded with the record on petition for judicial review transmitted to the district court. Because Thompson Creek has already submitted a copy of its *Objection* with attached exhibits to the district court, IDWR will not resubmit to the court copies of the exhibits to Thompson Creek's *Objection*.

Dated this 16th day of April, 2007.



DAVID R. TUTHILL, JR.
Interim Director

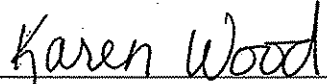
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 17 day of April 2007.

Document Served: **ORDER SETTLING AGENCY TRANSCRIPT AND RECORD**

Scott Campbell
Dylan B. Lawrence
MOFFATT THOMAS
P.O. Box 829
Boise, ID 83701

Reed W. Larsen
COOPER & LARSEN
P.O. Box 4229
Pocatello, ID 83205-4229



Karen Wood
Administrative Assistant
Department of Water Resources


IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO AND FOR THE COUNTY OF CUSTER

IN RE: IDAHO DEPARTMENT OF WATER)
RESOURCES AMENDED FINAL ORDER) AGENCY'S CERTIFICATE
CREATING WATER DISTRICT NO. 170) OF RECORD ADDENDUM
_____)

STATE OF IDAHO)
County of Ada) ss
)

I, David R. Tuthill, Jr., Interim Director of the Idaho Department of Water Resources,
do hereby certify that the above and foregoing record addendum in the above-entitled matter
was compiled and bound under my direction, and is a true and correct record of the pleadings,
papers and proceedings therein as shown in the index to this record.

IN WITNESS WHEREOF, I have hereunto set by hand and affixed the seal of the
Department of Water Resources at Boise, Idaho this 16th day of April, 2007



DAVID R. TUTHILL, JR.,
Interim Director



DISTRICT COURT
CUSTER COUNTY
IDAHO
SEVENTH JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF CUSTER
MAIN STREET, PO BOX 385
CHALLIS, IDAHO 83226

R Brunker
2007 APR 23 PM 3:28

THOMPSON CREEK MINING COMPANY)

VS.)

IDWR)

Case No: CV-2006-0000066

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is set for:

Status	Wednesday, May 16, 2007	02:30 PM
Judge:	Brent J. Moss	
Courtroom:	Custer County Courtroom	

I certify that copies of this Notice were served as follows on April 23rd, 2007.

Plaintiff's Counsel:
Scott L. Campbell Esq
PO Box 829
Boise ID 83701

Mailed XX Hand Delivered Faxed

Defendant's Counsel:
Phillip J. Rassier Esq
P O Box 83720
Boise ID 83720-0098

Mailed XX Hand Delivered Faxed

Dated: Monday, April 23, 2007
Barbara C. Breedlove
Clerk Of The District Court

By: Ruth Brunker
Deputy Clerk

NOTICE OF HEARING

DISTRICT COURT
CUSTER COUNTY
IDAHO
R. Brunke
2007 MAY -1 PM 2:53

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
18976.7

Attorneys for Thompson Creek Mining Company

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

IN THE MATTER OF CREATING THE
UPPER SALMON RIVER BASIN WATER
DISTRICT (DESIGNATED AS WATER
DISTRICT NO. 170)

THOMPSON CREEK MINING COMPANY,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV-2006-66

MOTION TO AUGMENT RECORD AND
MOTION FOR EXTENSION OF TIME FOR
FILING BRIEF

MOTION TO AUGMENT RECORD AND MOTON
FOR EXTENSION OF TIME FOR FILING BRIEF - 1

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This Motion affects the deadline for Thompson Creek to submit its brief in this matter. Accordingly, Thompson Creek requests expedited consideration of this Motion.

Petitioner Thompson Creek Mining Company hereby moves this Court, pursuant to Idaho Code Section 67-5275(3), Idaho Rule of Civil Procedure 84(*l*), and Idaho Appellate Rule 30, for an order augmenting the agency record with the documents attached hereto as Exhibits A-T.¹ In addition, Thompson Creek moves this Court, pursuant to I.R.C.P. 84(*o*), I.A.R. 34(*e*), and this Court's previous *Order Governing Judicial Review* of September 26, 2006, for an order extending the deadline for Thompson Creek's brief by 21 days from the date of this Court's action on this Motion. Pursuant to Idaho Rule of Civil Procedure 84(*o*) and Idaho Appellate Rule 34(*e*), Thompson Creek has contemporaneously filed a memorandum and an affidavit in support of this motion explaining the bases for the requested orders.

Idaho Rule of Civil Procedure 84(*o*) and Idaho Appellate Rule 30 provide that all motions, including those to augment the record, "shall be determined without oral argument," unless otherwise ordered by this Court. Accordingly, the need for oral argument is left to the discretion of this Court.

¹ These are the same Exhibits A-T to Thompson Creek's previous *Objection to Administrative Record Lodged by the Department of Water Resources* of April 3, 2007. Thompson Creek previously provided copies of that Objection and Exhibits A-T to this Court and to the other parties of record. Accordingly, in order to avoid unnecessarily reproducing and distributing those voluminous exhibits, Thompson Creek has not provided additional copies of Exhibits A-T to the other parties of record with this Motion, but will do so upon request. In addition, in accordance with Idaho Appellate Rule 30 (incorporated by reference by Idaho Rule of Civil Procedure 84(*l*)), Thompson Creek is providing copies of Exhibits A-T to the Court with this Motion. In accordance with I.R.C.P. 84(*p*), Thompson Creek is providing only one copy of each, although a courtesy copy of each is being provided to the Court's chambers in Madison County.

DATED this 26th day of April, 2007.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Dylan B. Lawrence
Dylan B. Lawrence – Of the Firm
Attorneys for Thompson Creek Mining
Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2007, I caused a true and correct copy of the foregoing MOTION TO AUGMENT RECORD AND MOTION FOR EXTENSION OF TIME FOR FILING BRIEF to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
Idaho Water Center
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700


☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Phillip J. Rassier
Garrick L. Baxter
Chris M. Bromley
Deputy Attorneys General
IDAHO DEPARTMENT OF WATER RESOURCES
Idaho Water Center
322 E. Front Street, 6th Floor
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Boise, ID 83720-0098
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Reed W. Larsen
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Pocatello, ID 83205-4229
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☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile


Dylan B. Lawrence

CLERK OF DISTRICT COURT
CUSTER COUNTY
IDAHO
R. Brinkley
2007 MAY -1 PM 2:53

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
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18976.7

Attorneys for Thompson Creek Mining Company

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

IN THE MATTER OF CREATING THE
UPPER SALMON RIVER BASIN WATER
DISTRICT (DESIGNATED AS WATER
DISTRICT NO. 170)

Case No. CV-2006-66

THOMPSON CREEK MINING COMPANY,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

MEMORANDUM IN SUPPORT OF MOTION
TO AUGMENT RECORD AND MOTION
FOR EXTENSION OF TIME FOR FILING
BRIEF

Pursuant to Idaho Rule of Civil Procedure 84(o), Petitioner Thompson Creek Mining Company hereby submits this memorandum in support of its *Motion to Augment Record and Motion for Extension of Time for Filing Brief* (the "Motion").

I. MOTION TO AUGMENT THE RECORD

A. Background

In its Motion, Thompson Creek requests that this Court exercise its authority under Idaho Code Section 67-5275(3), Idaho Rule of Civil Procedure 84(l), and Idaho Appellate Rule 30, to augment the agency record with certain relevant documents that the Director of the Department of Water Resources has specifically excluded from the record. The documents to be added to the record consist of Exhibits A-T to the Motion and to Thompson Creek's previous *Objection to Administrative Record Lodged by the Department of Water Resources* of April 3, 2007 (the "Objection").

This is a critical issue because Thompson Creek will be confined to the record in discussing the background and circumstances of the Director's creation of this new water district in the upcoming briefing of this matter. See IDAHO CODE § 67-5277. And, without these additional documents, it will be impossible for Thompson Creek to explain to this Court the history of the creation of the new district and why, among other things, Thompson Creek believes the Director's actions violated Due Process requirements of the state and federal constitutions, as well as the Idaho Administrative Procedure Act.

Specifically, this request arises in the context of Thompson Creek's challenge to the Director's decision to create a new water district, Water District No. 170 ("WD170"), in a large portion of central Idaho that drains the upper portions of the Salmon River. While there are

a handful of small, pre-existing water districts in this area, the vast majority of the water users affected by the Director's decision were previously not included within any water districts.

A new water district generally involves the hiring and payment of a watermaster to oversee the distribution of water, as well as the payment of any costs necessary for the watermaster to carry out his or her duties. It also involves the purchase, installation, maintenance, and repair of lockable headgates and measuring devices by water users. All of these costs are to be borne by, and become personal debts of, the water users within the water district. And, the failure to pay these costs can result in prohibitions upon the ability to exercise one's water right. *See generally* IDAHO CODE §§ 42-601 – 42-620. Because of the costs and burdens that a water district imposes upon vested property rights, the creation of a water district is specifically subject to both constitutional Due Process requirements and the Idaho Administrative Procedure Act. *See* IDAHO CODE § 42-604, ¶¶ 2, 3; *Nettleton v. Higginson*, 558 P.2d 1048, 1055 (Idaho 1977).

In short, the creation of WD170 will be an expensive and burdensome proposition for the water users within the district's boundaries. As this Memorandum will explain in more detail, the Department is imposing these costs upon water users because the state of Idaho committed to the federal government that it would create WD170 in order to protect federal instream flow water rights in downstream reaches of the Salmon River. Because these federal water rights are instream flow rights, however, the federal government is specifically exempt from sharing in these water district costs. *See* IDAHO CODE § 42-605A(2). In other words, Idaho water users in the upper Salmon River basin are being required to bear the financial burden of protecting these federal instream flow water rights.

On March 21, 2007, the Department notified the parties of record and this Court that it had lodged the transcript and agency record in this matter pursuant to Idaho Rule of Civil Procedure 84(j). However, upon reviewing the documents included by the Department in the agency record, Thompson Creek determined that several additional documents should have been included by the Department in order to provide this Court with critical information necessary to fully understand the relevant issues and make an informed decision. Accordingly, on April 3, 2007, Thompson Creek timely filed its Objection, explaining the relevance of the additional documents and attaching them as exhibits.

On April 17, 2007, the Department filed its *Notice of Filing of Agency Transcript and Record* with this Court. Included with that Notice were additional documents to be added to the agency record. (R. at 240-88.) However, the Department failed to include in that addendum to the record the vast majority of the documents requested to be added by Thompson Creek in its Objection. And, as this Memorandum will explain, the explanation provided by the Director in his *Order Settling Agency Transcript and Record* (R. at 283-88) for excluding those documents is misleading and unpersuasive.

B. Argument

1. This Court Has Broad Discretion to Augment the Agency Record With Additional Relevant Materials

This Court has broad authority under several statutes and court rules to augment the agency record in this case. First, the Idaho Administrative Procedure Act specifically states that, in a judicial review of an agency action, “[t]he court may require corrections to the [agency] record.” IDAHO CODE § 67-5275(3). The lack of any detailed standards in this statutory provision indicates that this Court has broad discretion to correct the record by supplementing it with additional relevant documents.

In addition to this broad statutory authority, Idaho Rule of Civil Procedure 84(*I*)

provides that:

Any party desiring to augment the transcript or record with additional materials presented to the agency may move the district court within twenty-one (21) days of the filing of the settled transcript and record in the same manner and pursuant to the same procedure for augmentation of the record in appeals to the Supreme Court.

I.R.C.P. 84(*I*). Idaho Appellate Rule 30, in turn, provides that:

Any party may move the [] Court to augment or delete from the . . . agency's record. Such a motion shall be accompanied by a statement setting forth the specific grounds for the request and attaching a copy of any document sought to be augmented. . . .

I.A.R. 30. Again, the lack of any detailed standards in these provision indicates that this Court has broad discretion to augment the agency record with additional materials upon the motion of a party, as long as that party sets forth the grounds for the request and attaches copies of the documents to be added.

Moreover, the Idaho Administrative Procedure Act provides another, separate means for adding materials to the record. Idaho Code Section 67-5276(1)(a) specifically states that:

If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

IDAHO CODE § 67-5276(1)(a). Alternatively, assuming the same relevancy and materiality requirements are satisfied, "the court may take proof on the matter" if "there were alleged irregularities in procedure before the agency. *Id.* at § 67-5276(1)(b).

To be clear, Thompson Creek need not yet resort to filing an application to this Court for leave to present additional evidence pursuant to Section 67-5276. Accordingly, that statute is not directly applicable to Thompson Creek's Motion. Rather, Idaho Code Section 67-5275(3), Idaho Rules of Civil Procedure 84(j) and 84(l), and Idaho Appellate Rule 30 by themselves provide a sufficient basis for augmenting the record at this time. Thompson Creek mentions Section 67-5276 simply to point out that there is yet another legal means available for adding materials to the record.

In summary, Idaho statutes and rules provide several means for supplementing the agency record in this case. For the reasons explained below, Exhibits A-T to Thompson Creek's Motion—all of which were included as Exhibits A-T to Thompson Creek's Objection that it timely submitted to the Department—should be included in the agency record for this case.

2. I.R.C.P. 84(j) Specifically Requires All Exhibits to Objections to Be Included in the Record

The first reason that Exhibits A-T should be added to the agency record in this case is that applicable procedural rules specifically require it. The process for lodging, objecting to, and settling the administrative record is governed by Idaho Rule of Civil Procedure 84(j).

With respect to objections to the lodging of the record, that rule states:

Any objection made to a transcript and record shall be determined by the agency within fourteen (14) days of receipt thereof. The agency's decision on the objection and *all evidence, exhibits, and written presentations on the objection shall be included in the record* on petition for review.

I.R.C.P. 84(j) (emphasis added).

This language could not be more clear. It explicitly requires that "all . . . exhibits" to Thompson Creek's Objection "shall be included in the record." *Id.* (emphasis added). Again, Thompson Creek included all of the documents to be added to the record as exhibits to the

Objection that it timely submitted to the Department. Accordingly, based on this language, this Court should order the Department to supplement the record with all of the exhibits to Thompson Creek's Objection that have not already been added to the record.

The case of *Collins v. Collins* demonstrates this point. 946 P.2d 1345 (Idaho App. 1997). At issue in that case was a previous version of Idaho Appellate Rule 28(a)(1)(E). *Id.* at 1346-47. Like Idaho Rule of Civil Procedure 84(j), that rule required all attachments or affidavits in support of a motion for summary judgment to be included in the record on appeal. *Id.* In that case, when the record was served upon the parties, it did not include certain attachments to a previous motion for summary judgment, and one of the parties filed an objection to the record on that basis. *Id.* at 1347. The Court of Appeals sustained that objection, holding that the attachments must be added to the record because the applicable rule required "attachments" to be included in the record. *Id.* While *Collins* does not specifically involve Rule 84(j), the fact pattern and applicable rule at issue in that case are sufficiently similar to the current dispute before this Court. Simply put, pursuant to the plain language of Rule 84(j), exhibits to Thompson Creek's Objection must be added to the record.

3. The Wild & Scenic Rivers Agreement Should Be Added to the Record Because It Is Critical to Understanding the Basis of the Agency Action That Thompson Creek Is Challenging

As discussed above, the plain language of Rule 84(j) by itself requires the exhibits to Thompson Creek's Objection to be included in the administrative record. Even without that express requirement, however, the exhibits to Thompson Creek's Objection should be included in the administrative record because they are directly relevant to the creation of WD170 and whether that agency action was lawful. One such document is Exhibit N to Thompson Creek's Objection, which is a judicial stipulation executed in 2004 between the federal government, the

state of Idaho, and various other parties in the context of Idaho's Snake River Basin Adjudication (the "SRBA"). It was approved, with certain conditions, by the SRBA district court on November 17, 2004.

During the SRBA, the federal government filed several water right claims based upon certain provisions of the federal Wild & Scenic Rivers Act, 16 U.S.C. §§ 1271-87. Several parties, including Thompson Creek and the state of Idaho, objected to those claims, and the matter became consolidated subcase 75-71336 before the SRBA district court.

The federal government and Thompson Creek settled their dispute over the federal Wild & Scenic Rivers Act claims pursuant to a 1998 stipulation. However, several parties objecting to the federal claims remained in the subcase. Finally, in 2004, the federal government and the remaining parties settled their disputes pursuant to the 2004 stipulation contained in Exhibit N. Because that stipulation settled disputes over the federal government's Wild & Scenic Rivers Act claims, it has come to be known colloquially as the "Wild & Scenic Rivers Agreement" (the "W&SR Agreement" or the "Agreement"). As will be more fully explained below, this Agreement is critical to the creation of WD170 and should accordingly be included in the administrative record.

The agency record that the Department has already transmitted to this Court contains extensive references to and discussions of the W&SR Agreement. (R. at 57, 59, 60, 65, 240, 241, 242, 243, 244, 251, 263, 264, 265, 266, 268.) And, importantly, many of these references to the W&SR Agreement in the Department's record explicitly demonstrate that the Director and the Department *specifically relied* upon that Agreement as the basis for creating WD170. (R. at 57, 59, 65, 243, 266.) Because the Agreement was central to the Director's creation of WD170, it is "evidence considered" by the Department that must be included in the

agency record pursuant to Idaho Code Section 67-5249(2)(b). The previous citations to the record explicitly demonstrate this reliance, which means that the Agreement in Exhibit N must be added to the record as a matter of law.

In addition, the Director had essentially decided to create WD170 prior to the required administrative process based upon the W&SR Agreement. This "predetermination" violated constitutional Due Process requirements and the Idaho APA. In order to fully explain those issues to this Court, it will be necessary to refer to the Agreement in briefing. Accordingly, the W&SR Agreement is not only relevant, but is a critical document to this proceeding and should therefore be included in the administrative record.

Given that the Director relied upon the W&SR Agreement in forming WD170, its direct relevance to the matter before this Court, the fact that the State of Idaho was party to the Agreement, and the broad discretion granted to this Court to augment the agency record, this Court should order the Department to include the W&SR Agreement (Exhibit N to the Objection and this Motion) in the agency record for this case.

4. Other Documents Related to the Wild & Scenic Rivers Agreement Should Be Included in the Administrative Record Because They Are Critical to Understanding the History of the Creation of WD170

In addition to the W&SR Agreement itself, documents related to that Agreement should also be included in the administrative record. Accordingly, in addition to the W&SR Agreement itself, Thompson Creek suggests including seventeen specific documents in the record for this case: Exhibits A-M and O-R to Thompson Creek's Objection and Motion. Simply put, any discussion of the W&SR Agreement and the Director's creation of WD170 will be disjointed and incomplete if this Court is prohibited from referring to such documents during its consideration of this matter.

Again, the W&SR Agreement was executed in the context of a specific consolidated subcase before the SRBA district court. The state of Idaho was a party to that subcase. Accordingly, not only was the state a party to the W&SR Agreement itself, but it was served with every one of the documents in that subcase—and with every one of these documents that Thompson Creek seeks to add to the record.

And, importantly, Thompson Creek does not suggest that *every* document from that subcase should be included in the administrative record in the matter currently before this Court. Rather, Thompson Creek carefully selected documents that it believes will be helpful to this Court in understanding the history of the creation of WD170. Given this direct relevance to the matter before this Court, the fact that the state of Idaho was either party to or served with every one of these documents, and the broad discretion granted to this Court to augment the agency record, this Court should order the Department to include Exhibits A-M and O-R in the record.

5. Documents Related to the WD170 Steering Committee Should Be Included in the Record Because They Describe the Department's Basis for Creating WD170

During the months leading up to the hearing and orders regarding the creation of WD170, the Department coordinated a steering committee to provide input regarding the organizational structure, attributes, and funding of WD170. This steering committee consisted of Department employees and water users affected by the creation of WD170. Several of the documents related to this steering committee already appear in the record. (R. at 52-56, 57, 58-63, 64, 68-88, 93, 94-98, 115, 116, 122, 123, 246, 250, 251.) These include meeting announcements, meeting agendas, and meeting minutes.

One of the documents that Thompson Creek seeks to add to the administrative record—Exhibit T—is simply a letter on Department letterhead from Department employee Tim Luke announcing the formation of this steering committee and inviting certain water users to participate. Given that the Director has already included extensive steering committee materials in the record, Exhibit T is necessary to complete that effort. The Department cannot articulate a reason for including all of the other steering committee materials while excluding this one particular letter. And, this letter is relevant to the proceeding currently before this Court because it describes some of the history and basis for creating WD170.

While not strictly related to the WD170 Steering Committee, Exhibit S is substantially similar to the steering committee materials and should accordingly be included in the agency record, as well. Like Exhibit T, Exhibit S is a letter authored by Department employee Tim Luke on Department letterhead. It announces a meeting to discuss the formation of WD170 and describes the history of and bases for creating that water district. It also contains direct references to the W&SR Agreement. It is accordingly directly relevant to Thompson Creek's challenge to the creation of WD170 and should be included in the agency record.

6. The Department's Justifications for Excluding the Documents Suggested by Thompson Creek From the Record Are Unpersuasive

In his *Order Settling Agency Transcript and Record* of April 16, 2007, the Director provides a number of justifications for excluding Exhibits A-T from the record.

(R. at 283, 286.) For the reasons described below, all of those justifications are unpersuasive.

a. **Many of the Exhibits to Thompson Creek's Objection Were Submitted to the Director During the Administrative Proceedings and Are Accordingly Required to Be in the Record**

The Director argues that Exhibits A through T "were not made a part of the agency record in this matter before IDWR and were not part of the record considered by the Director in issuing the *Final Order Creating Water District No. 170* on March 8, 2006."¹ (R. at 286.) The Director also states that, "the proffered documents may well have been accepted into the record . . . while the hearing record was still open," (R. at 286), implying that the exhibits to Thompson Creek's Objection are somehow untimely. These are fallacious and misleading arguments for a variety of reasons.

First, many of the documents contained in Exhibits A through T to Thompson Creek's Objection and Motion were part of the agency record. Prior to the Director's issuance of the *Amended Final Order*, Thompson Creek submitted its *Written Comments* of November 18, 2005. Those *Written Comments* are in the administrative record. (R. at 269-75.) Importantly, when Thompson Creek submitted those *Written Comments* to the Director, it attached various documents as exhibits for the Director's review. Accordingly, all of those documents constitute "evidence received" by the Department that is required to be part of the administrative record pursuant to Idaho Code Section 67-5249(2)(b). The attachments to those *Written Comments* specifically included the documents that are Exhibits J, K, N, Q, and R to Thompson Creek's Objection and Motion. Those same documents were Exhibits A, B, E, C, and D to Thompson Creek's *Written Comments*, respectively. (R. at 3-4.)

¹ The Director's *Amended Final Order* creating WD170 was issued on April 6, 2006.

However, when the Director added the *Written Comments* to the administrative record, it specifically excluded those exhibits from the record. The Director cannot reasonably argue that Exhibits J, K, N, Q, and R to the Motion and Objection should be excluded from the record on the basis that they were not submitted to the Director during the administrative proceedings, when they in fact were submitted to the Director during the administrative proceedings as exhibits to Thompson Creek's *Written Comments*. How else is the public to submit a document to an agency for its consideration? This was either a gross oversight on the part of the Director, or an intentional effort on his part to exclude documents from the record. The fact that the Director only included the *Written Comments* (albeit minus the exhibits) in the record at the request of Thompson Creek in its Objection suggests the latter, because that document clearly qualifies as "evidence received" pursuant to Idaho Code Section 67-5249(2)(b) that should have been included in the record in the first place.

b. The Department Was a Party to or Directly Involved With All of the Documents Attached as Exhibits to Thompson Creek's Objection and Motion

The Director's basis for excluding Exhibits A-T to Thompson Creek's Objection and Motion is fallacious for another reason: the state of Idaho, and hence, indirectly, the Department, was either a party to, or was directly involved with, all of the documents that Thompson Creek seeks to add to the administrative record. Again, the documents at issue in the Motion fall into two general categories: (1) those that relate to the W&SR Agreement, and (2) those that relate to the WD170 Steering Committee.

With respect to the documents relating to the W&SR Agreement, the state of Idaho—hence the Department—was a party to that consolidated subcase before the SRBA district court. Accordingly, the state and the Department were either party to, or received service

of, every one of those documents. The Director's argument is particularly disingenuous with regard to the W&SR Agreement itself. Not only is the state of Idaho, and hence the Department, party to that Agreement, but the Department makes it readily available on its own website at <http://www.idwr.idaho.gov/water/districts/>.

With respect to the documents relating to the WD170 Steering Committee, that committee was organized and led by the Department. In fact, the two steering committee documents that Thompson Creek seeks to add to the administrative record (Exhibits S and T) were specifically authored by Department employee Tim Luke on Department letterhead.

This is not a situation in which Thompson Creek is seeking to supplement the record with its own factual findings that were not available to the Department during the administrative proceedings. Were this the case, then the Department would have a colorable argument that such materials should not be added to the record after the administrative proceeding.

Rather, Thompson Creek simply seeks to add documents to the record that provide this Court with the history of the creation of WD170 that goes beyond the documents selectively chosen by the Department. These documents should have been included in the record in the first place. The Department either authored, was a party to, or was directly involved with, all of these documents. Accordingly, the Department's argument that these documents should be excluded from the record because they "were not part of the record considered by the Director" is disingenuous and unpersuasive.

c. The Director's Discussion of Procedural Rules Governing the Agency Record is Based on Circular Reasoning

In his attempt to justify the exclusion of Exhibits A-T from the record, the Director in his *Order Settling Agency Transcript and Record* essentially explains that those

documents must be excluded because they were not part of the agency record. (R. at 286.) First, as this Memorandum has already explained, many of the documents in Exhibits A-T were in fact submitted directly to or were considered by the Director during the administrative proceedings and accordingly must be included in the agency record pursuant to Idaho Code Section 67-5249(2)(b). The Director's argument ignores this.

More generally, however, the Director's argument is an unpersuasive, simplistic truism. Section I.B.1 of this Memorandum discusses the multiple statutes and procedural rules that specifically allow this Court to augment the agency record with additional materials. By both their nature and their express terms, those provisions necessarily involve the addition of materials to the record *after* the administrative proceedings have concluded. To argue that certain materials should be excluded from the record precisely because the agency did not include them in the record is a circular line of reasoning that ignores all of the provisions discussed in Section I.B.1 of this Memorandum.

C. Summary

As this Motion has explained, the text of Idaho Rule of Civil Procedure 84(j) specifically requires all of the exhibits to Thompson Creek's Objection to be included in the agency record. That rule explicitly states that "all . . . exhibits . . . on the objection [to the administrative record] shall be included in the record on petition for review." I.R.C.P. 84(j) (emphasis added). Accordingly, the record for this case should be augmented to include Exhibits A-T to Thompson Creek's Objection and Motion.

In addition, Thompson Creek submitted Exhibits J, K, N, Q, and R to the Director during the administrative proceeding creating WD170 as part of its *Written Comments*. Accordingly, those documents constitute "evidence received" by the Department that must be

included in the agency record pursuant to Idaho Code Section 67-5249(2)(b). The Department also explains in the record that it relied upon the W&SR Agreement (Exhibit N) as the basis for creating WD170. Accordingly, that document is also required to appear in the record as “evidence considered” pursuant to the same statutory provision.

Moreover, even if the provisions cited above do not require Exhibits A-T to be included in the agency record as a matter of law, this Court still has broad discretion under the statutes and procedural rules described in Section I.B.1 of this Memorandum to add them to the record. As this Memorandum explains, all of Exhibits A-T are both relevant and material to the Director’s creation of WD170 and Thompson Creek’s legal challenge thereto. And, this is not a case in which Thompson Creek is attempting to supplement the record with information or data that was unavailable to the Department during the administrative process. Rather, the Department either directly authored, was a party to, or received service of each one of those documents.

Thompson Creek simply requests that this Court add Exhibits A-T to the administrative record so that they may be discussed in the upcoming briefing on this matter. Without them, it will be impossible for Thompson Creek to fully explain to this Court the relevant issues, particularly those related to Thompson Creek’s concerns based upon the constitutional Due Process clauses and the Idaho APA. And, given that Due Process concerns are at issue, any uncertainty on this motion should be resolved in favor of including the exhibits in the record.

The Department simply cannot articulate any legal, practical, or logical reason not to include Exhibits A-T to Thompson Creek’s Objection and Motion in the administrative record. Rather, the only reason not to include them is that the Department does not want them discussed

in the briefing. This is simply not a sufficient reason for exclusion, particularly after Thompson Creek has explained their relevance to this proceeding both in its Objection and in this Memorandum.

II. MOTION FOR EXTENSION OF TIME FOR FILING BRIEF


In its Motion, Thompson Creek also moves this Court for an order extending the deadline for submission of its brief in this matter. Idaho Appellate Rule 34(c) provides that “[a]ppellant’s brief shall be filed . . . within 35 days of the date that the . . . transcript and . . . agency’s record have been filed with the [] Court.” I.A.R. 34(c). Accordingly, because the Department filed the transcript and record with this Court on April 17, 2007, the current deadline for Thompson Creek to submit its first brief in this matter is Tuesday, May 22, 2007.

However, Rule 34(e) also provides that a motion for an extension of time for filing of a brief may be granted “upon a clear showing of good cause.” I.A.R. 34(e). And, the Court confirmed in its *Order Governing Judicial Review* of September 26, 2006 that the filing of a motion to augment the agency record by any party would constitute “good cause” for the purposes of Rule 34(e). This provision was included in that Order by agreement between the Department and Thompson Creek.

Accordingly, Thompson Creek moves this Court pursuant to these authorities for an order extending the deadline for Thompson Creek’s brief from May 22, 2007, until 21 days after this Court resolves Thompson Creek’s Motion. As required by Idaho Appellate Rule 34(e), Thompson Creek has contemporaneously filed an affidavit more fully explaining the basis for this request.

DATED this 26th day of April, 2007.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Thompson Creek Mining
Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2007, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO AUGMENT RECORD AND MOTION FOR EXTENSION OF TIME FOR FILING BRIEF** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
Idaho Water Center
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

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Dylan B. Lawrence

CLERK OF DISTRICT COURT
CUSTER COUNTY
IDAHO
R. Brunker
2007 MAY -1 PM 2:53

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Attorneys for Thompson Creek Mining Company

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

IN THE MATTER OF CREATING THE
UPPER SALMON RIVER BASIN WATER
DISTRICT (DESIGNATED AS WATER
DISTRICT NO. 170)

Case No. CV-2006-66

THOMPSON CREEK MINING COMPANY,

AFFIDAVIT OF SCOTT L. CAMPBELL

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

ORIGINAL

STATE OF IDAHO)
) ss.
County of Ada)

SCOTT L. CAMPBELL, having been duly sworn upon oath, deposes and states,
based upon personal knowledge, as follows:

1. This Affidavit supports Thompson Creek's request to extend the deadline for filing its brief in the above-referenced matter, contained in its *Motion to Augment Record and Motion for Extension of Time for Filing Brief* filed contemporaneously herewith (the "Motion").

This Affidavit is made pursuant to Idaho Appellate Rule 34(e).

2. Thompson Creek's brief is due Tuesday, May 22, 2007.

3. No extensions have been previously granted.

4. No previous requests for extensions have been denied.

5. An extension is necessary because the Department has denied Thompson Creek's request to include certain documents in the agency record for this case. Counsel for Thompson Creek have accordingly been required to prepare and submit to this Court its Motion and a lengthy memorandum in support thereof explaining why such documents should be added to the record. In addition, Thompson Creek will not know which of the documents proposed for inclusion in the record can be properly discussed in the upcoming briefing until this Court acts on Thompson Creek's Motion. Counsel for Thompson Creek will need time to prepare its brief in accordance with the terms of this Court's resolution of the Motion. Without this extension, Thompson Creek could potentially be required to submit its brief before this Court decides which, if any, documents to add to the record.

6. Thompson Creek requests an extension of 21 days from the date of this Court's resolution of the Motion. Because Thompson Creek does not know when this Court will

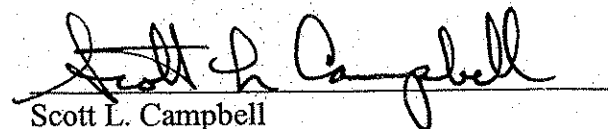
act on the Motion, Thompson Creek cannot specify at this time the specific date on which its brief would become due.

7. There has been no stipulation between the parties regarding this application for extension. However, the provision in Paragraph 4 of this Court's *Order Governing Judicial Review* of September 26, 2006, specifying that the filing of a motion to augment the agency record constitutes good cause to extend the briefing deadlines, was inserted into that order by agreement of the Department and Thompson Creek.

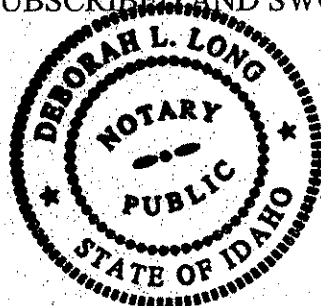
8. Thompson Creek solicited feedback from counsel of record regarding its extension request. The response from counsel for the Department is attached hereto as Exhibit A. It reflects that the Department is not opposed to the request for a deadline extension, and clarifies that the Department will oppose Thompson Creek's motion to augment the record. No response has yet been received from counsel for K.F. and Lillian B. Morgan Revocable Trust, the only other party to this matter.

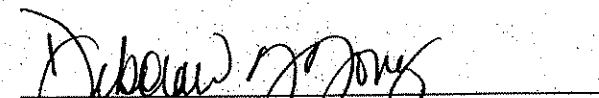
9. Thompson Creek assures the Court that it will file its brief within the extended time requested if the Motion is granted.

Further your affiant sayeth naught.


Scott L. Campbell

SUBSCRIBED AND SWORN to before me this 16th day of April, 2007.




NOTARY PUBLIC FOR IDAHO
Residing at Besse, Idaho
My Commission Expires 10/10/07

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2007, I caused a true and correct copy of the foregoing AFFIDAVIT OF SCOTT L. CAMPBELL to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
Idaho Water Center
322 E. Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

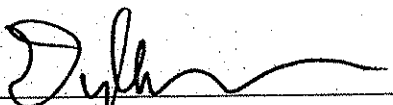
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Dylan B. Lawrence

Filed at 2:13 PM
May 11 2009
Clerk of the District Court
By Ruth Brunken

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

IN RE: IDAHO DEPARTMENT OF WATER)	
RESOURCES AMENDED FINAL ORDER	)	Case No. CV 2006-66
CREATING WATER DISTRICT NO. 170)	
<hr/>		
THOMPSON CREEK MINING COMPANY,)	
)	
Petitioner,)	
)	
vs.)	
)	
IDAHO DEPARTMENT WATER RESOURCES,)	
An agency of the State of Idaho,)	
)	
Respondent.)	
<hr/>		

**SECOND ADDENDUM TO
AGENCY'S RECORD ON APPEAL**

Appealed from the Department of Water Resources, of the State of Idaho
David R. Tuthill, Jr., Director

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UNITED STATES OF AMERICA

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Counsel for the United States of America

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE: SRBA	)	Consolidated Subcase Nos.: 63-25239, 75-13316
	)	and 75-13605
CASE NO. 39576)	
	)	Stipulation and Joint Motion for Order Approving
	)	Stipulation and Dismissing Objections
)	
)	

DESCRIPTIVE SUMMARY

This document is the Stipulation and Joint Motion for Order Approving Stipulation and Dismissing Objections, filed by the United States of America and Thompson Creek Mining Company.

STIPULATION

The United States of America ("United States") and Thompson Creek Mining Company ("Thompson Creek"), by and through their respective undersigned counsel, hereby stipulate and agree as follows:

1. Thompson Creek's withdrawal of its opposition to United States' claims: The objections filed by Thompson Creek against claims numbered 77-10986 (Salmon River MUSY-recreation claim), 75-13316 and 77-11941 (Salmon River Wild & Scenic River claims), and 75-13605 and 77-12775 (Church Wilderness claims) are hereby withdrawn with prejudice, subject to the Court approving the attached Order Approving Stipulation and Dismissing Objections. Thompson Creek also agrees to promptly withdraw from any further participation in appellate proceedings involving the United States' Wilderness Claims in consolidated subcase no. 75-13605, Supreme Court No. 24545, 24546, 24547, 24548, 24557, 24558 and 24559 (consolidated under Supreme Court No. 24545), and the United States' MUSY Claims in consolidated subcase no. 63-25239, Supreme Court No. 24560. Thompson Creek further agrees that it shall not file any objections against any of the United States' claims made on behalf of the U.S.D.A. Forest Service as

identified in Attachment 1 hereto, including the United States' claims made under state law for MUSY purposes.

2. Clarification concerning claims to be withdrawn: The United States has previously notified the Idaho Department of Water Resources ("IDWR") and the Court that claims numbered 75-13606 and 77-12776 were incorrectly abstracted and should be withdrawn (incorrectly abstracted Church Wilderness claims). The United States has also previously notified the parties, including Thompson Creek and the State, that claim number 75-13504 was to be withdrawn (4th of July Creek MUSY-recreation claim). The United States and Thompson Creek agree that those claims, including both the federal and state law bases for the United States' 4th of July Creek MUSY-recreation claim number 75-13504, shall be withdrawn with prejudice, each party to bear its own costs, fees and expenses.
3. United States' subordination of its claims: The United States hereby subordinates its claims numbered 77-10986, 75-13316, 77-11941, 75-13605 and 77-12775 to Thompson Creek claims numbered 72-07193, 72-07219, 72-07220, 72-07257 and 72-07414 (the "Thompson Creek claims"). The United States' subordination of its Salmon River MUSY-recreation claim number 77-10986 to the Thompson Creek claims includes subordination of both the federal and state law bases for that claim, and shall apply to any new claim number which may be assigned by IDWR to the state law basis for that claim. The United States further agrees that it shall not object to the Thompson Creek claims in further proceedings in the

Snake River Basin Adjudication ("SRBA"). Based upon the subordination of the United States' claims to the Thompson Creek claims, the United States and Thompson Creek agree and request the Court to confirm by approving the attached Order Approving Stipulation and Dismissing Objections, that the existence of the United States' claims or water rights shall not preclude the Court from approving and decreeing Thompson Creek's claims or water rights for any reason, including but not limited to the basis that water is not legally available for appropriation.

4. Stipulation not to be used against parties: The United States and Thompson Creek agree and request the Court to confirm by approving the attached Order Approving Stipulation and Dismissing Objections, that this Stipulation has been entered into based upon good faith negotiations for the purpose of resolving legal disputes, including pending litigation, by compromise and settlement and that nothing in this Stipulation, including the United States' subordination of its claims to the Thompson Creek claims, or any offers or compromises made in the course of negotiating this Stipulation, shall be construed as admissions against interest or tendered or used as evidence to show the validity or invalidity of the United States' or Thompson Creek's claims, including the quantities of water claimed, or in any other manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those seeking approval of the Order

Approving Stipulation and Dismissing Objections, for interpretation or enforcement of this Stipulation or for a purpose contemplated by Idaho Rule of Evidence 408.

**JOINT MOTION FOR ORDER APPROVING STIPULATION
AND DISMISSING OBJECTIONS**

The United States and Thompson Creek request the Court to approve the foregoing Stipulation, to order that the objections filed by Thompson Creek Mining Company to claims numbered 77-10986, 75-13316, 77-11941, 75-13605 and 77-12775 are dismissed with prejudice, and to order that, pursuant to Idaho Rule of Evidence 408, nothing in the Stipulation, including the United States' subordination of its claims to the Thompson Creek claims, or any offers or compromises made in the course of negotiating the Stipulation, shall be construed as admissions against interest or tendered or used as evidence to show the validity or invalidity of the United States' or Thompson Creek's claims, including the quantities of water claimed, or in any other manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those seeking approval of the Order Approving Stipulation and Dismissing Objections, for interpretation or enforcement of the Stipulation or for a purpose contemplated by Rule 408.

The Memorandum In Support Of Joint Motion For Order Approving Stipulation And Dismissing Objections filed herewith establishes that the order sought by this motion, which is attached hereto, is fully in accordance with the language of Idaho Rule of Evidence 408. Such an order would serve not only to facilitate the settlement between the United States and Thompson Creek, thus streamlining the process, but would very likely have the effect of encouraging future

settlements in the SRBA. The provisions of Rule 408, as well as the policy underlying that rule and the policy of the SRBA district court, are directed at furthering the strong public policy favoring out-of-court settlement of disputes over litigation.

Wherefore, the United States and Thompson Creek respectfully request that this Court grant this motion in all respects by entering the attached proposed order.

The United States and Thompson Creek further request oral argument and expedited consideration of this matter.

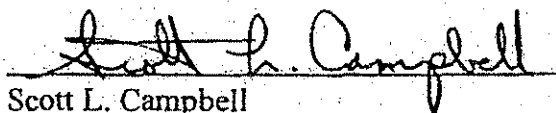
Dated May 29, 1998



Bruce D. Bernard
Attorney, General Litigation Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street, Suite 945
Denver, Colorado 80202
(303) 312-7319

Counsel for the United States of America

Dated May 26, 1998



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Key Financial Center, 10th Floor
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P.O. Box 1539
Boise, Idaho 83701
(208) 343-5454

Counsel for Thompson Creek Mining Company

Attachment 1

PRIM_PURP_USE	SOURCE_NAME	BASIN	ST_FILE_NO
C	BOISE RIVER	63	25243
C	LITTLE SLATE CREEK	79	10755
C	LOCHSA RIVER	81	10492
C	LOLO CREEK	84	10893
C	NORTH FORK CLEARWATER RIVER	83	10805
C	RAPID RIVER	78	10670
C	RED RIVER	82	10954
C	SELWAY RIVER	81	10622
C	SOUTH FORK PAYETTE RIVER	65	19565
C	SOUTH FORK RED RIVER	82	10976
C	SOUTH FORK SALMON RIVER	77	11792
C	VALLEY CREEK	71	10434
F	BOISE RIVER	63	25239
F	LOCHSA RIVER	81	10501
F	LOLO CREEK	84	10884
F	NORTH FORK CLEARWATER RIVER	83	10806
F	RAPID RIVER	78	10669
F	RED RIVER	82	10953
F	SELWAY RIVER	81	10623
F	SOUTH FORK PAYETTE RIVER	65	19559
F	SOUTH FORK RED RIVER	82	10523
F	SOUTH FORK SALMON RIVER	77	11791
H	BONNEVILLE HOT SPRINGS	65	19505
H	JERRY JOHNSON HOT SPRINGS	81	10679
H	KIRKHAM HOT SPRING	65	19472
L	ALTURAS LAKE	71	10370
L	BAYHORSE LAKE	72	11015
L	BULL TROUT LAKE	65	19487
L	HAZARD LAKE	78	10564
L	PETTIT LAKE	71	10364
L	REDFISH LAKE	71	10372
L	STANLEY LAKE	71	10368
L	WARM LAKE	77	10665
W&S	CLEARWATER RIVER, MIDDLE FORK	81	10625
W&S	LOCHSA RIVER	81	10513
W&S	MIDDLE FORK SALMON	77	13844
W&S	RAPID RIVER	78	11961
W&S	SALMON RIVER	77	11941
W&S	SALMON RIVER	75	13316
W&S	SELWAY RIVER	81	10472
R	LOWER S FK CLEARWATER RIVER	82	10950
R	MIDDLE FORK BOISE RIVER	63	25430
R	NORTH FORK CLEARWATER RIVER	83	10807
R	SALMON RIVER	72	11183
R	SALMON RIVER	72	11218
R	SALMON RIVER	71	10416
R	SALMON RIVER	77	10986
W	FRANK CHURCH RIVER OF NO RETURN WILDERNESS	75	13605
W	FRANK CHURCH RIVER OF NO RETURN WILDERNESS	77	12775
W	GOSPEL HUMP WILDERNESS	82	11120
W	GOSPEL HUMP WILDERNESS	77	12774
W	SELWAY BITTERROOT WILDERNESS	81	11191
NRA	HELLS CANYON NRA	79	13597
NRA	SAWTOOTH NRA	65	20766
NRA	SAWTOOTH NRA	63	30428
NRA	SAWTOOTH NRA	72	16272
NRA	SAWTOOTH NRA	71	10761
NRA	SAWTOOTH NRA	37	19833

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Consolidated Subcase Nos.: 63-25239,
	)	75-13316 and 75-13605
Case No. 39576)	
	)	ORDER APPROVING STIPULATION
	)	AND DISMISSING OBJECTIONS
_____)	

The United States of America ("United States") and Thompson Creek Mining Company ("Thompson Creek"), through their respective counsel of record, have presented a Stipulation and Joint Motion For Order Approving Stipulation And Dismissing Objections ("Stipulation"), dated May ____, 1998, and a Memorandum In Support Of Joint Motion For Order Approving Stipulation And Dismissing Objections ("Memorandum"). The Stipulation deals with the terms under which Thompson Creek shall withdraw its objections to claims filed by the United States.

Based upon the Court's review of the Stipulation and the Memorandum and the file in this matter,

THE COURT HEREBY ORDERS that all terms of the Stipulation are approved by the Court and shall govern these proceedings as among the parties to the Stipulation and among the parties to the SRBA and that:

1. The objections filed by Thompson Creek against claims numbered 77-10986, 75-11316, 77-11941, 75-13605 and 77-12775 are deemed withdrawn with prejudice.
2. The terms of the subordination set forth in the Stipulation shall be incorporated in

the partial decrees entered for claims numbered 77-10986, 75-11316, 77-11941, 75-13605 and 77-12775 (and in any partial decree which may be entered for any new claim number which may be assigned by the Idaho Department of Water Resources to the state law basis for claim number 77-10986) and in the final decree entered in this matter, and, based upon the subordination of the United States' claims to the Thompson Creek claims as set forth in the Stipulation, the existence of the United States' claims or water rights shall not preclude the Court from approving and decreeing those Thompson Creek claims or water rights for any reason, including but not limited to the basis that water is not legally available for appropriation.

3. Pursuant to Idaho Rule of Evidence 408, nothing in the Stipulation or this Order, including the United States' subordination of its claims to the Thompson Creek claims, or any offers or compromises made in the course of negotiating the Stipulation, shall be construed as admissions against interest or tendered or used as evidence to show the validity or invalidity of the United States' or Thompson Creek's claims, including the quantities of water claimed, or in any other manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those for interpretation or enforcement of the Stipulation or for a purpose contemplated by Rule 408.

IT IS SO ORDERED.

DATED this _____ day of May, 1998.

DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER APPROVING STIPULATION**

AND DISMISSING OBJECTIONS was mailed on May _____, 1998, with sufficient first-

class postage to the following:

IDWR Document Depository

PO Box 83720

Boise, ID 83720-0098

All parties to the MUSY Claims, Consolidated Subcase 63-25239

All parties to the Wild and Scenic Rivers Claims, Consolidated Subcase 75-13316

All parties to the Wilderness Claims, Consolidated Subcase 75-13605

Deputy Clerk

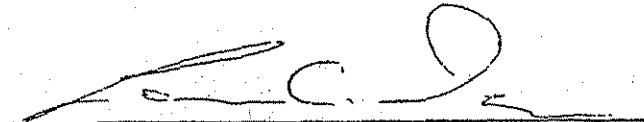
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 1998, I served a true and correct copy of the foregoing **STIPULATION AND JOINT MOTION FOR ORDER APPROVING STIPULATION AND DISMISSING OBJECTIONS**, by depositing a copy thereof in the U.S. mail, postage prepaid, or via Fed Ex where indicated, upon the following:

All parties indicated on the attached Certificate of Service for MUSY Claims

All parties indicated on the attached Certificate of Service for Wild and Scenic Rivers Claims

All parties indicated on the attached Certificate of Service for Wilderness Claims


Lorrin Dyer

CERTIFICATE OF SERVICE via FEDERAL EXPRESS OR MAIL FOR (ALL) MUSYA CLAIMS

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RIVERS ACT CLAIMS

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Environment and Natural
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Gary A. DeMott
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Boise, ID 83709

CERTIFICATE OF SERVICE via FEDERAL EXPRESS OR MAIL FOR WILDERNESS ACT CLAIMS

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Environment and Natural
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U.S. Department of Justice
Environment and Natural Resources Division

JUN 01 1998

WMC:LCD
90-6-2-63C

Lorrin C. Dyer, Legal Secretary
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
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Denver, Colorado 80202

Telephone: (303) 312-7313
Facsimile: (303) 312-7331
lorrin.dyer@usdoj.gov

May 29, 1998

via Federal Express

Diana R. Delaney, Chief Deputy Clerk
DISTRICT COURT
253 Third Avenue North
Twin Falls, ID 83301

Re: Snake River Basin Adjudication
Consolidated Subcase Nos.: 63-25239, 75-13316 and 75-13605

Dear Ms. Delaney:

Enclosed for filing please find an original and one copy of the following documents:

1. Stipulation and Joint Motion for Order Approving Stipulation and Dismissing Objections and [proposed] Order Approving Stipulation and Dismissing Objections; and
2. Memorandum in Support of Joint Motion for Order Approving Stipulation and Dismissing Objections.

Thank you for your attention to this matter.

Sincerely,

Lorrin C. Dyer
Secretary to Bruce Bernard

Enclosures

cc: Certificate of Service for MUSY Claims, Wild and Scenic Rivers Claims and Wilderness Claims (via Federal Express where indicated)

1998 JUN 16 PM 3: 21

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Consolidated Subcase Nos.: 63-25239,
	)	75-13316 and 75-13605
Case No. 39576)	
	)	ORDER APPROVING STIPULATION
	)	AND DISMISSING OBJECTIONS
_____)	

The United States of America ("United States") and Thompson Creek Mining Company ("Thompson Creek"), through their respective counsel of record, have presented a Stipulation and Joint Motion For Order Approving Stipulation And Dismissing Objections ("Stipulation"), dated May 29, 1998, and a Memorandum In Support Of Joint Motion For Order Approving Stipulation And Dismissing Objections ("Memorandum"). The Stipulation deals with the terms under which Thompson Creek shall withdraw its objections to claims filed by the United States.

Based upon the Court's review of the Stipulation and the Memorandum and the file in this matter,

THE COURT HEREBY ORDERS that all terms of the Stipulation are approved by the Court and shall govern these proceedings as among the parties to the Stipulation and among the parties to the SRBA and that:

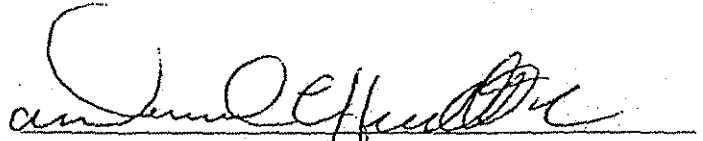
1. The objections filed by Thompson Creek against claims numbered 77-10986, 75-11316, 77-11941, 75-13605 and 77-12775 are deemed withdrawn with prejudice.
2. The terms of the subordination set forth in the Stipulation shall be incorporated in

the partial decrees entered for claims numbered 77-10986, 75-11316, 77-11941, 75-13605 and 77-12775 (and in any partial decree which may be entered for any new claim number which may be assigned by the Idaho Department of Water Resources to the state law basis for claim number 77-10986) and in the final decree entered in this matter, and, based upon the subordination of the United States' claims to the Thompson Creek claims as set forth in the Stipulation, the existence of the United States' claims or water rights shall not preclude the Court from approving and decreeing those Thompson Creek claims or water rights for any reason, including but not limited to the basis that water is not legally available for appropriation.

3. Pursuant to Idaho Rule of Evidence 408, nothing in the Stipulation or this Order, including the United States' subordination of its claims to the Thompson Creek claims, or any offers or compromises made in the course of negotiating the Stipulation, shall be construed as admissions against interest or tendered or used as evidence to show the validity or invalidity of the United States' or Thompson Creek's claims, including the quantities of water claimed, or in any other manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those for interpretation or enforcement of the Stipulation or for a purpose contemplated by Rule 408.

IT IS SO ORDERED.

DATED this ^{June} 16 day of May, 1998.

A handwritten signature in dark ink, appearing to read "Daniel C. Hurlbutt, Jr.", written over a horizontal line.

DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

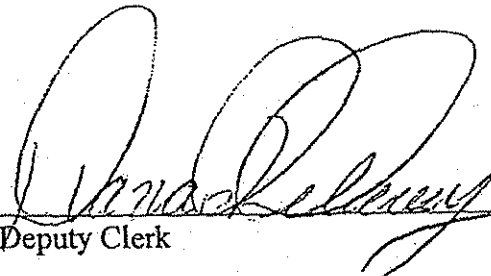
I certify that a true and correct copy of the **ORDER APPROVING STIPULATION
AND DISMISSING OBJECTIONS** was mailed on ^{June} ~~May~~ 16, 1998, with sufficient first-class postage to the following:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

All parties to the MUSY Claims, Consolidated Subcase 63-25239

All parties to the Wild and Scenic Rivers Claims, Consolidated Subcase 75-13316

All parties to the Wilderness Claims, Consolidated Subcase 75-13605


Deputy Clerk

UNITED STATES OF AMERICA

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Attorneys for the United States of America

STATE OF IDAHO

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Deputy Attorney General
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(208) 334-4126

Attorneys for the State of Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE: SRBA

CASE NO. 39576

)
)
) Consolidated Subcase No. 75-13316
) Wild & Scenic Rivers Act Claims
) (Encompassing Subcases 75-13316, 77-11941,
) 77-13844, 78-11961, 81-10472, 81-10513 and 81-10625)
)

) Stipulation and Joint Motion for Order
) Approving Stipulation and Entry of Partial
) Decrees
)
)
)

STIPULATION

The United States of America ("United States"), and objectors, the State of Idaho ("State"), and Dewey Mining Company, et al.,^{1/} City of Challis, et al.,^{2/} Big Bend Irrigation

^{1/} Dewey Mining Company, Thunder Mountain Gold, Inc., and Potlatch Corp., all represented by Jeffrey C. Fereday, Esq.

^{2/} City of Challis, City of Pocatello, City of Salmon, Basic American, Inc., and Lamb-Weston, Inc., all represented by Josephine P. Beeman, Esq.

District, et al.,^{3/} Idaho Power Company, A & B Irrigation District, et al.,^{4/} and Thomas R. Stuart III, et al.,^{5/} (the State and these other objectors referred to as "Objectors;" the United States and Objectors sometimes referred to as the "parties"), who constitute all the parties to these consolidated subcases, hereby stipulate and agree, by and through their respective undersigned counsel, as follows:

1. Stipulation to Entry of Partial Decrees: The United States and Objectors stipulate to entry of the partial decrees for the United States' Wild and Scenic Rivers Act federal reserved water rights claims numbered 75-13316, 77-11941, 77-13844, 78-11961, 81-10472, 81-10513 and 81-10625, attached hereto and incorporated herein as Attachments 1 through 6 (the "Partial Decrees"), all parties to bear their own costs and fees. The Partial Decrees confirm the United States' federal reserved water rights pursuant to the Wild and Scenic Rivers Act, as recognized by the Idaho Supreme Court in *Potlatch v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000), and set forth the quantities and terms of those rights. The Partial Decrees quantify these federal reserved water rights based on identified flows, subject to subordinations to certain existing and future rights and uses, and the preclusion of out-of-basin diversions above the ending point of each of the respective federal reserved water rights as identified in the Partial Decrees. The parties request the Snake River Basin Adjudication Court ("SRBA Court" or "Court") to

^{3/} Big Bend Irrigation District, Boise-Kuna Irrigation District, New York Irrigation District, and Wilder Irrigation District, all represented by Albert P. Barker, Esq.

^{4/} A & B Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company, Progressive Irrigation District, Enterprise Irrigation District, New Sweden Irrigation District, Snake River Valley Irrigation District, Idaho Irrigation District, Harrison Canal & Irrigation Company, Burgess Canal & Irrigation Company, Peoples Canal & Irrigation Company, Egin Bench Canals, Inc., and North Fremont Canal Systems, Inc., all represented by Jerry R. Rigby, Esq.

^{5/} Thomas R. Stuart III, Gene Bray, Bonnie Schonefeld, Alma Marie Osborn, and Phyllis K. Kochert, all represented by William Eddie, Esq.

approve, by granting the Joint Motion for Order Approving Stipulation and Entry of Partial Decrees and entering the attached proposed Order, the quantification of these Wild and Scenic Rivers federal reserved water rights as agreed to by the parties and set forth in the Partial Decrees. The parties also agree to entry of a final decree incorporating the Partial Decrees.

2. Administration of Water Rights.

a. Enforcement. The State, through the Idaho Department of Water Resources ("IDWR") and local water districts created and supervised by IDWR pursuant to Idaho Code §§ 42-604 et seq., shall distribute water to the federal reserved water rights set forth in this Stipulation and the Partial Decrees and all other hydraulically connected water rights, regardless of subbasin location, above the ending point of the respective federal reserved water rights in accordance with priority dates, quantities and all other elements of the rights as provided in this Stipulation and the Partial Decrees, and applicable law at all times when there is a hydraulic connection between the federal reserved water right and the right to be regulated. While this paragraph does not affect the present administration of existing water rights from tributary sources that are administered separately, all new water rights that are hydraulically connected with the Wild and Scenic Rivers federal reserved water right will be administered as a single source.

b. Creation of Water Districts.

(1) IDWR will establish water districts as necessary to assist IDWR in the administration of water rights. The parties agree that, regardless of whether a water district has been established for an area, IDWR will: A) collect and record diversion data; B) enforce the water rights in priority; and C) curtail unauthorized or excessive diversions as necessary.

(2) Within six months after issuance of the Partial Decrees confirming the Wild and Scenic Rivers federal reserved water rights, the parties will file a joint petition with the SRBA Court, pursuant to Idaho Code § 42-1417, for an order for interim administration of administrative basins 71 and 72 and IDWR will establish a water district for the Upper Salmon River Basin. The Upper Salmon Water District (the "USWD") shall initially consist of administrative basins 71 and 72, those basins for which Director's Reports have been filed for irrigation and other water rights. Within six months of the filing of Director's Reports for administrative basins 73, 74 and 75, the parties will file a joint petition with the SRBA Court, pursuant to Idaho Code § 42-1417, for an order for interim administration of those basins and IDWR will incorporate those basins into the USWD. Existing water districts within the basins will be converted to subdistricts within the USWD as appropriate to facilitate management. Other subdistricts will be formed as deemed necessary to accomplish the purposes of the USWD. Creation of the USWD shall involve full participation by water users in the area in accordance with state law, and the existing water districts will have an important role. The resulting organization will be fully under the supervision of IDWR.

(3) The parties agree that at present, the limited number of water rights above the ending point of the other Wild and Scenic Rivers federal reserved water rights confirmed by the Partial Decrees does not justify the creation of water districts for purposes of administration. If in the future any party believes that creation of a water district above the ending point of any of the other Wild and Scenic Rivers federal reserved water rights is warranted, such party shall be entitled to file a petition with the SRBA Court for an order of interim administration (or, in the event the final SRBA decree has been entered, file a petition with IDWR for administration) of such basin and the other parties to this Stipulation shall not

oppose such petition and IDWR will establish a water district for the basin if IDWR determines that a water district is necessary to properly administer water rights in the basin.

c. Administration of New Water Rights. IDWR will condition each water right permit or license issued after the effective date of this Stipulation for a non-de minimis water right upstream from the ending point of the Wild and Scenic River as set forth in this Stipulation to require that each diversion is equipped with lockable controlling works, a measuring device, and a data logger or other suitable device that regularly monitors and records the rate of diversion. The condition will require that the data logger or other suitable device be configured to accept a removable data card or other suitable memory device that must be submitted by the water user to the IDWR or the watermaster on a quarterly basis, for each quarter when diversion occurs.

d. Prevention of Unauthorized Uses. IDWR and the watermaster will utilize all appropriate techniques, including but not limited to remote-sensing, field observation and inventory, coordination with local water users and citizens, and input from other agencies, to identify unauthorized uses of water. IDWR and/or the watermaster will curtail identified unauthorized uses of water based on the authorities of Chapter 6, Title 42, Idaho Code, and IDWR will pursue appropriate civil enforcement action as provided in Idaho Code §§ 42-351 and 42-1701B.

e. Administration of Existing Water Rights. IDWR and the watermaster shall conduct a systematic inventory of diversions, giving priority to those diversions that have the greatest potential influence on other water rights. IDWR will evaluate the staffing requirement for operation of the water district and will identify needs for subdistricts and deputy watermasters as required. IDWR and the watermaster will specifically identify and curtail

unauthorized uses. IDWR and the watermaster will monitor all non-de minimis diversions through site visits and measurements by means of current meter or other appropriate methods to ensure that when water rights are found to be exceeded, such exceedance will be curtailed and that other unauthorized uses are curtailed, based on the authorities of Chapter 6, Title 42, Idaho Code. IDWR will collect and report diversion data on a quarterly basis; provided, however, that during times of shortage, IDWR and the watermaster will ensure that diversion data will be collected and reported on a daily basis as necessary to properly administer water rights. IDWR will require installation of lockable controlling works and measurement devices for any existing diversion if it is determined that the water right holder is refusing or failing to comply with IDWR's or the watermaster's instructions and will pursue appropriate civil enforcement action as provided in Idaho Code §§ 42-351 and 42-1701B.

f. Availability of Water Use Information. IDWR shall provide the United States, at its request, any water measurement reports prepared by or for IDWR and any other information relating to the implementation of this Stipulation, including the basis for all information reported in the subordination database described in paragraph 3.e. below.

g. Coordination. In order to provide for effective water management by IDWR and the watermaster, and to ensure effective communication between interested parties, periodic coordination meetings shall be held between IDWR, the watermaster, and water users, including representatives of private water users and the federal government. The purposes of such meetings include:

- (1) Agreeing upon management goals;
- (2) Identifying and prioritizing stream reaches or other locales needing improved management to focus the use and attention of available resources;

- (3) Identifying sources of funding for regulation, equipment, and facilities;
- (4) Identifying the need for creation of additional subdistricts with deputy watermasters;
- (5) Sharing data and other information and assessing progress in meeting management needs.

Coordination meetings will involve members of the regulated public (advisory committee members) to assure continuing acceptance of the program. The meetings will be held periodically for the first two years of operation to provide for the development of consensus of appropriate procedures, and then annually or more frequently as driven by need.

h. United States' Measuring Devices. The stream gages identified in the Partial Decrees shall be utilized in the administration of the water rights confirmed by those Partial Decrees. The United States will install, maintain and provide Objectors access to such gages as necessary for administration of the water rights confirmed by the Partial Decrees. IDWR agrees to cooperate with the United States in the installation and maintenance of such gages, and the State agrees to provide access to state-owned lands for the purpose of installing and maintaining said gages.

i. Remedies. In the event the State fails to administer water rights in accordance with the terms of this Stipulation, the Partial Decrees and applicable law, any party to this Stipulation, upon a satisfactory showing to the SRBA Court, or any successor state court with jurisdiction to enforce the final decree issued by the SRBA Court, of such failure to administer, shall be entitled to an order under the Court's continuing jurisdiction, as described in paragraph 5, compelling the State to properly administer the water rights.

3. Administration of Subordination Provisions of Partial Decrees. The Wild and Scenic Rivers federal reserved water rights confirmed by the Partial Decrees are subordinated to certain water rights and uses with points of diversion or impoundment and places of beneficial use within the river basin upstream from the ending point of each of the federal reserved water rights. Administration of the subordination provisions shall be as follows:

a. Accounting of Diversion and Acreage Amounts Under Future Use Subordinations. IDWR will deduct from the subordination amounts provided for in paragraph 10.b.(6) of the Partial Decree for the Main Salmon River and paragraph 10.b.(5) of the other Partial Decrees the amount of the diversion rate, and if for irrigation, the acreage, of any decree, permit or license for a water right that IDWR determines will enjoy the benefit of those subordination provisions. If IDWR licenses any right for less than the amount permitted, the amount of the difference will be credited back to the subordination amount from which the permitted diversion was previously deducted.

b. Municipal Provider Reporting Requirement and Allocation to Future Use Subordination. IDWR will condition every new permit or license issued for a municipal water right with a priority date after the effective date of the Stipulation and enjoying the benefit of the subordination provided by paragraph 10.b.(5) of the Partial Decree for the Main Salmon River with the reporting condition described below. The reporting condition will require the right holder to report to IDWR when diversions commence under the permit or license and from that time forward to report to IDWR by January 31 of each year all new municipal connections installed in the prior calendar year of a size greater than 4 inches in diameter. The report will include the size, capacity, and location of each connection required to be reported. IDWR will, by March 1 of the year the report is received, post the reported information to the subordination

accounting database provided for in paragraph 3.e. and reduce the remaining subordination amount provided for in paragraph 10.b.(6) of the Partial Decree for the Main Salmon River by the capacity of any connection(s) greater than 2 cfs capacity, other than capacity for fire protection.

c. Diversion Adjustment for Forfeiture or Abandonment

(1) If a water right enjoying the benefit of subordination provision 10.b.(6) of the Partial Decree for the Main Salmon River or provision 10.b.(5) of the remainder of the Partial Decrees (other than water rights of the United States, instream flow water rights, nonconsumptive water rights and replacement water rights as defined in those paragraphs of the Partial Decrees), is lapsed, forfeited, or abandoned, the diversion rate and, if for irrigation, the acreage will be added to the applicable subordination amount. The amount of diversion rate and, if for irrigation, acreage to be added to the applicable subordination will be the same quantity of subordination assigned to the water right at the time the water right was lost.

(2) The State may petition the SRBA Court, or any successor state court with jurisdiction to enforce the final decree issued by the SRBA Court, for an increase in the applicable subordination amount based upon the forfeiture or abandonment of water rights senior to the rights confirmed by the Partial Decrees that have points of diversion or impoundments and places of use within the basin and upstream from the Wild and Scenic River ending point, or subordinated to under paragraphs 10.b.(1) & (2) of the Partial Decrees, but, in either case, not for domestic uses (that if junior to the federal reserved water right would be subordinated to under paragraph 10.b.(3) of the Partial Decrees), stockwater uses (that if junior to the federal reserved water right would be subordinated to under paragraph 10.b.(4) of the Partial Decrees), and municipal uses (that if junior to the federal reserved water right would be

subordinated to under paragraph 10.b.(5) of the Partial Decree for the Main Salmon River). Any such petition shall be served on the U.S.D.A. Forest Service, 161 East Mallard Drive, Suite A, Boise, ID, 83706 or such other address that the Forest Service has provided IDWR, and the United States shall have the right to participate in all proceedings thereon for the purposes of monitoring, limiting or opposing the petition. The forfeiture or abandonment of water rights will be eligible to increase the subordination amounts if the following conditions are met:

(A) the forfeiture or abandonment is based on a period of non-use entirely after the effective date of this Stipulation;

(B) the forfeiture or abandonment results in an increased flow to the affected Wild and Scenic River; and

(C) the forfeited or abandoned water right is decreed by the SRBA Court or licensed by IDWR (not required to be claimed in the SRBA). The amount of any increase in subordination will be determined by the SRBA Court, or any successor state court with jurisdiction to enforce the final decree issued by the SRBA Court. The amount added to the future use subordination will be limited to use in the sub-basin in which it was historically used.

d. Water Right Database. IDWR will maintain a publicly available database of water right records on file with IDWR that are above the ending point of each Wild and Scenic federal reserved water right. The database will identify the statutory elements for each active water right record.

e. Subordination Accounting Database. In the normal course of application and claim processing, IDWR will maintain publicly available information for purposes of implementation of the subordinations provided under the Partial Decrees. The data will:

(1) identify all accepted applications for permit and all water right claims with points of diversion located upstream from the ending points of the water rights confirmed by the Partial Decrees;

(2) identify applications for permit that IDWR has determined will enjoy the benefit of any of the subordination provisions of the Partial Decrees, including the information described in paragraph 3.f.(1) below;

(3) separately identify those water rights decrees, permits and licenses that come within the applicable subordination provision;

(4) with respect to water rights decrees, permits and licenses that come within the future use subordination (paragraph 10.b.(6) of the Partial Decree for the Main Salmon River, paragraph 10.b.(5) of the other Partial Decrees), identify the diversion rate, and for irrigation rights, the number of irrigated acres, decreed, permitted or licensed, including any reductions in permitted amounts as licensed, to be credited to the applicable future use subordination;

(5) with respect to forfeited, abandoned or lapsed water rights as identified in paragraph 3.c.(1), identify those rights and the diversion and, if for irrigation, the acreage that IDWR has credited the applicable future use subordination as described in paragraph 3.c.(1) above;

(6) identify all accepted applications for permit and all water right claims that IDWR has determined will, if approved, constitute water rights of the United States, instream flow water rights, nonconsumptive water rights or replacement water rights within the meaning of those terms as used in paragraph 10.b.(6)(C) of the Partial Decree for the Main Salmon River, paragraph 10.b.(5)(C) of the Partial Decree for the Middle Fork Salmon River,

and paragraph 10.b.(5)(B) of the other Partial Decrees and that would otherwise be deducted from the applicable subordination amounts for future rights, and identify all water rights decrees, permits and licenses for water rights that IDWR has determined constitute water rights of the United States, instream flow water rights, nonconsumptive water rights or replacement water rights as described above;

(7) with respect to rights that come within the municipal right subordination provision (paragraph 10.b.(5) of the Partial Decree for the Main Salmon River), identify when diversions commence under any such permit or license, annually identify water diversion data, including the number of connections that exceed the 2 cfs threshold as reported to IDWR by the municipal right holder, and the amount subtracted from the future use subordination (paragraph 10.b.(6) of the Partial Decree for the Main Salmon River); and

(8) set forth a running total of the amounts of future use subordination remaining available for appropriation under paragraph 10.b.(6) of the Partial Decree for the Main Salmon River and paragraph 10.b.(5) of the other Partial Decrees. IDWR will make available to the United States or any other party upon request any and all documentation concerning the above referenced matters. "Publicly available" as used in this Stipulation means remote computer access or other similar future technology and the ability to request, on an as needed basis, composites of all water right records on contemporary media in a form that can be manipulated with contemporary technology (software and hardware). IDWR will review any comments or suggestions made by any of the parties concerning the adequacy of this records system.

f. Subordination Implementation and Review.

(1) IDWR will include in the public notice of any application for permit that IDWR has determined will enjoy the benefit of any of the subordination provisions, the subordination provision that IDWR has determined is applicable to the application and, with respect to the subordinations provided in paragraph 10.b.(6) of the Partial Decree for the Main Salmon River and paragraph 10.b.(5) of the other Partial Decrees, the diversion amount and, if for irrigation, the acreage applied for that IDWR has determined will enjoy the benefit of the identified subordination provision. This subordination information will be posted to the subordination accounting database concurrently with issuance of the public notice along with the remaining balance of available diversion rate and acreage for the applicable subordination.

(2) Upon issuance of a water right permit that IDWR has determined will enjoy the benefit of any of the subordination provisions of the Partial Decrees, IDWR will post to the subordination accounting database the subordination provision that IDWR has determined is applicable to the permit and the affected Partial Decrees and, with respect to the subordinations provided in paragraph 10.b.(6) of the Main Salmon Partial Decree and paragraph 10.b.(5) of the other Partial Decrees, the diversion amount and, if for irrigation, the acreage, allocated to the permit that IDWR has determined will enjoy the benefit of the identified subordination provision, as well as the remaining balance of available diversion rate and acreage for that subordination provision.

(3) Issuance of a license for a water right enjoying subordination under paragraph 10.b.(6) of the Partial Decree for the Main Salmon River or paragraph 10.b.(5) of any other Partial Decree will be posted to the subordination accounting database. If the issuance of the license resulted in an adjustment of the diversion rate or, if for irrigation, the acreage, the

amount of the adjustment will be noted in the posting of the license and reflected in an adjustment of the remaining diversion rate and acreage available under the subordination.

(4) Upon entry of a partial decree for a claimed water right that IDWR has determined will enjoy the benefit of any of the subordination provisions of the Partial Decrees, IDWR will post the partial decree to the subordination database along with the identity of the subordination provision that IDWR has determined is applicable to the partial decrees and, with respect to the subordination provision provided in paragraph 10.b.(6) of the Partial Decree for the Main Salmon River and paragraph 10.b.(5) of the other Partial Decree, the diversion rate and, if for irrigation, the acreage, allocated to the partial decree that IDWR has determined will enjoy the benefit of the identified subordination provision, as well as the remaining balance of available diversion rate and acreage for that subordination provision.

(5) Upon determination that an application for permit or water right claim will, if approved, constitute a water right of the United States, an instream flow water right, a nonconsumptive water right or a replacement water right within the meaning of those terms as used in paragraph 10.b.(6)(C) of the Partial Decree for the Main Salmon River, paragraph 10.b.(5)(C) of the Partial Decree for the Middle Fork Salmon River, and paragraph 10.b.(5)(B) of the other Partial Decrees that would otherwise be deducted from the applicable subordination amounts for future rights, and upon issuance of a water rights decree, permit or license for a water right that IDWR has determined constitutes a water right of the United States, an instream flow water right, nonconsumptive water right or replacement water right as described above, IDWR will post to the subordination accounting database the type of water right IDWR has determined the right to be, the diversion rate and, if for irrigation, the acreage, applied for, claimed or allocated to the water rights decree, permit or license that IDWR has

determined constitutes a water right of the United States, an instream flow water right, nonconsumptive water right or replacement water right as described above;

(6) Any party may contact IDWR at any time to request additional information concerning the matters described above or to inform IDWR of concerns raised by IDWR's proposed determination with respect to any permit, license, partial decree, abandonment, forfeiture, or lapsing of a water right or any municipal connection in excess of 2 cfs. Any party may request reconsideration or explanation by IDWR of implementation or proposed implementation of any subordination provision at any time and the parties agree to make a good faith effort to resolve questions and reach agreement regarding implementation of the subordination provisions.

4. Resolution of Disputes Concerning Implementation of Stipulation. The parties and IDWR agree to make good faith efforts to resolve any disputes which arise concerning IDWR's implementation of this Stipulation. IDWR will provide any party requested information concerning the subject matter of any such disputes. In the event the parties are unable to resolve any such disputes, any party may seek review of IDWR's implementation and enforcement of this Stipulation and administration of the water rights confirmed by the Partial Decrees, including, but not limited to, administration of the subordination provisions of the Partial Decrees, in the SRBA Court or any successor state court with jurisdiction to enforce the final decree issued by the SRBA Court. Review shall be de novo and any disputed factual issues shall be decided based upon a preponderance of the evidence. Judicial review must be brought within six months of the challenged action, or within six months of the notification of the challenged action (if notice is required under the terms of the Stipulation), whichever is later.

5. Continuing Jurisdiction. The parties request the SRBA Court, by granting the Joint Motion for Order Approving Stipulation and Entry of Partial Decrees and entering the attached proposed Order, to retain jurisdiction for the purpose of resolving disputes regarding the implementation and enforcement of this Stipulation and administration of the water rights confirmed by the Partial Decrees, including, but not limited to, administration of the subordination provisions of the Partial Decrees.

6. Parties' Rights to Object to Claims and Protest Permit Applications.

a. Adjudication Claims. This Stipulation does not affect the right of any party to object to any other claims in the SRBA (i.e., claims other than the United States' Wild and Scenic Rivers Act claims which are the subject of this Stipulation) or any claim in any other adjudication. The United States, however, may not assert in any objection that the claim (if subordinated to by the applicable Partial Decree) should be denied or conditioned to protect the flow of any Wild and Scenic River subject to this Stipulation.

b. Permit Applications. This Stipulation does not affect the right of any party to protest any application for permit to appropriate water filed with IDWR. The United States, however, may not assert in any protest that the application for permit (if subordinated to by the applicable Partial Decree) should be denied or conditioned (including on public interest grounds) to protect the flow of any of the Wild and Scenic Rivers subject to this Stipulation.

7. Request for Approval of the Stipulation and Entry of Partial Decrees by the SRBA Court. The parties agree to submit this Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees to the SRBA Court in full satisfaction of Claim Nos. 75-13316, 77-11941, 77-13844, 78-11961, 81-10472, 81-10513, and 81-10625. The parties agree to jointly provide notice of the Stipulation and Motion through the SRBA Docket Sheet and by

personal notice to Objectors and to jointly present affidavits and such other evidence as may be required by the Court for the approval of the Stipulation and Partial Decrees.

8. Defense of Stipulation. The parties agree to jointly support and defend the Joint Motion for Order Approving the Stipulation and for Entry of Partial Decrees against any and all objections or other challenges that may arise in any phase of the SRBA, including any appeals. If the SRBA Court fails to approve the Stipulation and to enter the Partial Decrees exactly as set forth herein, the Stipulation is voidable by any party, provided that any party electing to void the Stipulation shall notify the other parties and the Court in writing of that election within 30 days of the order of the Court not approving the Stipulation and/or Partial Decrees as set forth herein. Failure to provide such notification in the manner provided shall result in forfeiture of such right. If the Stipulation is voided, all parties shall retain all existing claims and objections as though no Stipulation ever existed.

9. Stipulation Does Not Affect Statutory or Regulatory Authority. The parties agree that nothing in this Stipulation or the Partial Decrees shall be construed or interpreted:

- a. to establish any standard to be used for the quantification of federal reserved water rights; or
- b. to limit or affect the authority of the United States or the State provided by statute or regulation.

10. Stipulation Not to be Used Against Parties. The United States and Objectors agree and request the SRBA Court to confirm by granting the Joint Motion for Order Approving Stipulation and Entry of Partial Decrees and entering the attached proposed Order, that this Stipulation has been entered into based upon good faith negotiations for the purpose of resolving legal disputes, including pending litigation, by compromise and settlement and that nothing in

this Stipulation, including the stipulated entry of partial decrees for these claims and any affidavits or other evidence or pleading submitted for the approval of the Stipulation, or any offers or compromises made in the course of negotiating this Stipulation, shall be construed as admissions against interest or tendered or used as evidence to support or oppose any party's claims or objections in the SRBA or in any other adjudication involving claims for the same or similar purposes, including the quantities of water claimed, or in any other manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those seeking approval of the Order Approving Stipulation and Entry of Partial Decrees, for interpretation, enforcement or administration of this Stipulation or the Partial Decrees or for a purpose contemplated by Idaho Rule of Evidence 408.

11. Stipulation and Partial Decrees Binding. This Stipulation shall bind and inure to the benefit of the respective successors of the parties. Upon entry of the Partial Decrees, the Partial Decrees shall be binding on all parties in the SRBA.

12. Mutual Covenants of Authority. The parties represent and acknowledge that each of the undersigned is authorized to execute this Stipulation and Joint Motion on behalf of the party they represent.

13. Non-Severability. The provisions of this Stipulation are not severable. If any provision of this Stipulation is found to be unlawful and of no effect, then the parties hereto shall resume negotiations to revise such unlawful provision.

14. Effective Date: The effective date of this Stipulation shall be September 1, 2003.

JOINT MOTION FOR ORDER APPROVING STIPULATION AND ENTRY OF PARTIAL DECREES

The parties request the SRBA Court to: (1) approve the foregoing Stipulation; (2) approve and enter the Partial Decrees for claims numbered 75-13316, 77-11941, 77-13844, 78-

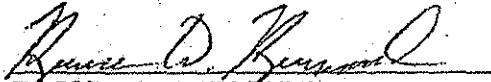
11961, 81-10472, 81-10513 and 81-10625; (3) retain jurisdiction for the purpose of resolving any disputes concerning implementation and enforcement of the Stipulation and administration of the water rights confirmed by the Partial Decrees, including, but not limited to, administration of the subordination provisions of the Partial Decrees; and (4) order that, pursuant to Idaho Rule of Evidence 408, nothing in the Stipulation, including the stipulated entry of Partial Decrees for these claims and any affidavits or other evidence or pleading submitted for the approval of the Stipulation, or any offers or compromises made in the course of negotiating the Stipulation, shall be construed as admissions against interest or tendered or used as evidence to support or oppose any party's claims or objections in the SRBA or in any other adjudication involving claims for the same or similar purposes, including the quantities of water claimed, or in any other manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those seeking approval of the Order Approving Stipulation and Entry of Partial Decrees, for interpretation, enforcement or administration of the Stipulation or the Partial Decrees or for a purpose contemplated by Rule 408. The order sought by this Joint Motion, which is attached hereto, is fully in accordance with Idaho Rule of Evidence 408, as well as the policy underlying that rule and the policy of the SRBA Court directed at furthering the strong public policy favoring out-of-court settlement of disputes over litigation.

Wherefore, the United States and Objectors respectfully request that this Court grant this Joint Motion in all respects by entering the attached proposed order.

The United States and Objectors request expedited consideration of this Joint Motion.

The parties have executed this Stipulation and Joint Motion on the date following their respective signatures.

FOR THE UNITED STATES:



BRUCE D. BERNARD

DAVID W. GEHLERT

U.S. Department of Justice

Environment and Natural Resources Division

General Litigation Section

999 18th Street, Suite 945

Denver, Colorado 80202

(303) 312-7319

Date: 8/17/04

DAVID L. NEGRI

U.S. Department of Justice

Environment and Natural Resources Division

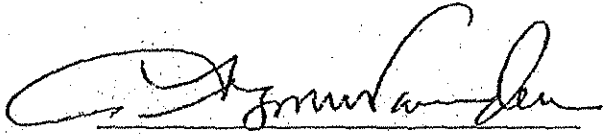
General Litigation Section

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FOR THE STATE OF IDAHO, including THE IDAHO WATER RESOURCES BOARD:



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(208) 334-4126

Date:

8/ June / 2004

FOR DEWEY MINING COMPANY, THUNDER MOUNTAIN GOLD, INC., and POTLATCH CORPORATION:

Jeffrey C. Fereday

Date: 6/11/04

JEFFREY C. FEREDAY

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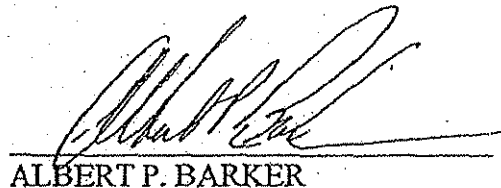
Boise, ID 83701-2720

(208) 388-1200

FOR CITY OF CHALLIS, CITY OF POCA TELLO, CITY OF SALMON, LAMB WESTON,
INC., and BASIC AMERICAN, INC.:

Josephine P. Beeman Date: July 12, 2004
JOSEPHINE P. BEEMAN
Beeman & Associates, P.C.
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(208) 331-0950

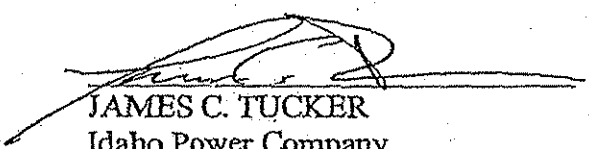
FOR BIG BEND IRRIGATION DISTRICT, BOISE-KUNA IRRIGATION DISTRICT, NEW
YORK IRRIGATION DISTRICT, and WILDER IRRIGATION DISTRICT:



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Date: July 17, 2004

FOR IDAHO POWER COMPANY:



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Date:

7/22/04

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FOR A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, PROGRESSIVE IRRIGATION DISTRICT, ENTERPRISE IRRIGATION DISTRICT, NEW SWEDEN IRRIGATION DISTRICT, SNAKE RIVER VALLEY IRRIGATION DISTRICT, IDAHO IRRIGATION DISTRICT, HARRISON CANAL & IRRIGATION COMPANY, BURGESS CANAL & IRRIGATION COMPANY, PEOPLES CANAL & IRRIGATION COMPANY, EGIN BENCH CANALS, INC., and NORTH FREMONT CANAL SYSTEMS, INC.:


JERRY R. RIGBY

Rigby, Thatcher, Andrus, Rigby

Kam & Moeller, Chtd.

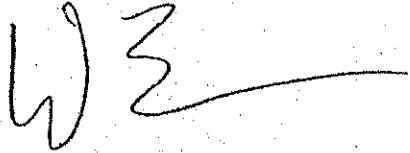
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(208) 356-3633

Date: 6-11-04

FOR THOMAS R. STUART III, GENE BRAY, BONNIE SCHONEFELD, ALMA MARIE
OSBORN, and PHYLLIS K. KOCHERT:



WILLIAM EDDIE, Esq.
Advocates for the West
PO Box 1612
Boise, ID 83701

Date: July 16, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2004, I served a true and correct copy of the foregoing **STIPULATION AND JOINT MOTION FOR ORDER APPROVING STIPULATION AND ENTRY OF PARTIAL DECREES**, by depositing a copy thereof in the U.S. mail, postage prepaid, to the following:

All parties indicated on the SRBA Court's Certificate of Mailing
for Consolidated Subcase 75-13316 Wild and Scenic Rivers Act
Claims.

Bruce D. Kennard

NOV 17 2004
RINGERT CLARK

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TWIN FALLS CO., IDAHO
 EILEEN
 T. DEBBIE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

**Consolidated Subcase No. 75-13316
Wild & Scenic Rivers Act Claims
(Encompassing Subcases 75-13316, 77-11941, 77-13844
78-11961, 81-10472, 81-10513 and 81-10625)**

Order Approving Stipulation and Entry of Partial Decrees

ORDER APPROVING STIPULATION AND ENTRY OF PARTIAL DECREES

CONF

THE SRBA DISTRICT COURT NOW FINDS AS FOLLOWS:

The parties have satisfied the requirements of Chapter 14, Title 42, Idaho Code, including Section 42-1411A, the Idaho Rules of Civil Procedure and SRBA Administrative Order 1. The Stipulation is a fair and equitable settlement of all the United States' claims in the SRBA for federally designated Wild and Scenic Rivers. The Stipulation does not adversely affect the interests of persons not party to the Stipulation and good cause has been shown for granting the Joint Motion for Order Approving Stipulation and Entry of Partial Decrees.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. All terms of the Stipulation and the Partial Decrees for the United States' Wild and Scenic Rivers Act federal reserved water rights claims numbered 75-13316, 77-11941, 77-13844, 78-11961, 81-10472, 81-10513 and 81-10625, as attached to the Stipulation (the "Partial Decrees"), are hereby ratified, confirmed and approved.

2. The Court shall retain jurisdiction for the purpose of resolving disputes regarding the implementation and enforcement of the Stipulation and administration of the water rights confirmed by the Partial Decrees, including, but not limited to, the relationship between these federal water rights and other water rights and administration of the subordination provisions of the Partial Decrees.


3. Pursuant to Idaho Rule of Evidence 408, nothing in the Stipulation, including the stipulated entry of Partial Decrees for these claims and any affidavits or other evidence or pleading submitted or relied upon for approval of the Stipulation, or any offers or compromises made in the course of negotiating the Stipulation, shall be construed as admissions against interest or tendered or used as evidence to support or oppose any party's claims or objections in

the SRBA or in any other adjudication involving claims for the same or similar purposes, including the quantities of water claimed, or in any other manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those for interpretation, enforcement or administration of the Stipulation or the Partial Decrees or for a purpose contemplated by Rule 408. This Order is fully in accordance with Idaho Rule of Evidence 408, as well as the policy underlying that rule and the policy of the SRBA Court directed at furthering the strong public policy favoring out-of-court settlement of disputes over litigation.

4. The water rights adjudicated by the Partial Decrees are in full satisfaction of all the United States' claims in the SRBA for federally designated Wild and Scenic Rivers.

IT IS SO ORDERED.

DATED this 16th day of November, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER APPROVING STIPULATION AND ENTRY OF PARTIAL DECREES was mailed on November 16, 2004, with sufficient first-class postage to the following:

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REXBURG, ID 83440-0250

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PO BOX 2773
BOISE, ID 83701-2773

705 NOV 16 PM 4

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE SRBA)
CASE NO. 39576)
_____)

PARTIAL DECREE FOR
Federal Reserved Water Rights 75-13316 and 77-11941
Salmon Wild and Scenic River

1. Name and address of owner: UNITED STATES OF AMERICA, on behalf of the
U.S.D.A. Forest Service
550 W. Fort Street, MSC033
Boise, ID 83724
2. Source of water: Salmon River
3. Quantity of right:
 - a. When the stream flow at the Salmon River near Shoup quantification site as defined in Section 3.d. below ("Shoup gage") is less than 13,600 cfs, the United States is entitled to the following flows:

Period of Use	Discharge (cfs)	Period of Use	Discharge (cfs)
January 1-15	1440	July 1-15	4730
January 16-31	1450	July 16-31	2700
February 1-15	1500	August 1-15	1390
February 16-28(29)	1550	August 16-31	1240
March 1-15	1510	September 1-15	1200
March 16-31	1540	September 16-30	1400
April 1-15	1590	October 1-15	1570
April 16-30	2470	October 16-31	1700
May 1-15	3920	November 1-15	1820
May 16-31	7310	November 16-30	1730
June 1-15	9450	December 1-15	1600
June 16-30	7790	December 16-31	1510

- b. When the stream flow at the Shoup gage is greater than or equal to 13,600 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying

the subordination provided in this right), the United States is entitled to all flows, up to 28,400 cfs.

c. This water right does not prohibit the appropriation, diversion and use of water within the Salmon River basin upstream from the ending point of the Salmon Wild and Scenic River at Long Tom Bar and excluding the Middle Fork Salmon River basin, when the stream flow at the Shoup gage exceeds the flow amount in Section 3.a. and is less than 13,600 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying the subordination provided in this right); provided, however, that the flow amounts identified in section 3.a. are maintained between the Shoup gage and the ending point of the Salmon Wild and Scenic River at Long Tom Bar.

d. The quantification site for the flows identified above is the USGS Salmon River near Shoup gage, number 13307000, located in NE1/4SW1/4, Sec. 14, T23N, R17E, Boise Meridian; Latitude N 45° 19' 20.8", Longitude W 114° 26' 21.2".

e. Water rights within the watershed of the Salmon River Basin upstream from the ending point of the Salmon Wild and Scenic River at Long Tom Bar will be administered to ensure the satisfaction of this right throughout the Wild and Scenic reach. When the stream flow at the Shoup gage is less than the flow amounts in section 3.a. or greater than 13,600 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying the subordination provided in this right), water shall not be diverted at any location in the Salmon River basin above such ending point, including locations downstream from the Shoup gage (but excluding the Middle Fork Salmon River basin that is subject, instead, to the Middle Fork Salmon River Partial Decree No. 77-13844), other than under water rights enjoying the subordinations provided in section 10.b. "Futile call" may not be asserted as a basis for allowing any such downstream diversions so long as there is a hydraulic connection between the Salmon River and the right to be regulated.

f. This water right precludes any diversion of water out of the watershed of the Salmon River Basin upstream from the

ending point of the Salmon Wild and Scenic River at Long Tom Bar, except for transfers of points of diversion from above the ending point to below the ending point.

4. Priority date:

July 23, 1980.

5. Point of diversion:

There is no diversion associated with this instream flow water right. The legal description of the beginning and ending points of the instream flow water right are as follows:

Beginning point: Mouth of the North Fork of the Salmon River -- SW1/4SW1/4, Sec. 16, T24N, R21E, Boise Meridian; Latitude N 45° 24' 17.6", Longitude W 113° 59' 36.7".

Ending point: Long Tom Bar -- SE1/4SE1/4, Sec. 31, T25N, R5E, Boise Meridian; Latitude N 45° 27' 35.9", Longitude W 115° 52' 48.8".

6. Purpose of use:

To fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.), and the Central Idaho Wilderness Act of 1980, Pub.L. 96-312, 94 Stat. 948, July 23, 1980 (codified as amended at 16 U.S.C. §§ 1132, 1274, 1281).

7. Period of use:

01-01 to 12-31.

8. Place of use:

This instream flow water right is used throughout the designated Salmon Wild and Scenic River from the beginning point to the ending point as identified above.

9. Annual volume of consumptive use:

This instream flow water right is non-consumptive (other than evaporation and evapotranspiration which may take place within the designated segment).

10. Other provisions necessary for definition or administration of this water right:

a. This is a federal reserved water right based on the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.), and the Central Idaho Wilderness Act of 1980, Pub.L. 96-312, 94 Stat. 948, July 23, 1980 (codified as amended at 16 U.S.C. §§ 1132, 1274, 1281).

b. This Partial Decree is entered pursuant to that Stipulation among the United States, the State of Idaho and other objectors effective September 1, 2003 (the "Stipulation"), and pursuant to that Stipulation this water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and places of use within the Salmon River Basin upstream from the ending point, as identified in element 5 above:

(1) All water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.

(2) All applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation.

(3) All domestic uses, which for purposes of this Partial Decree shall be defined as set forth at I.C. § 42-111(1)(a) & (b) to mean the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day or any other uses, if the total does not exceed a diversion rate of four one-hundreds (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day, provided that this domestic use subordination is limited and defined by I.C. 42-111(2), so that the subordination shall not and does not apply to multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in I.C. 42-111(1)(b) (0.04 cfs/2,500 gpd), and by I.C. 42-111(3), so that the subordination shall not and

does not apply to multiple water rights for domestic uses which satisfy a single combined water use that would not itself come within the above definition of domestic use.

(4) All de minimus stockwater uses, which for the purposes this Partial Decree shall be defined as set forth at I.C. § 42-1401A(11) to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. This de minimus stockwater use subordination is limited and defined by I.C. § 42-111(3), so that the subordination shall not and does not apply to multiple water rights for stockwater uses which satisfy a single combined water use that would not itself come within the above definition of stockwater use.

(5) All water rights having a priority date later than the effective date of the Stipulation and held by a municipality incorporated under Idaho Code, §§ 50-101 and -102, or an authorized franchise service provider for an incorporated municipality for use within the municipality's or provider's service area; provided, however, that any individual municipal hookup that has a manufacturer's rated maximum flow capacity of equal to or greater than 2 cfs of water on an instantaneous basis, other than capacity for fire protection, will count against the finite future subordination limit in paragraph (6) below. The phrase "municipal use" shall be defined as set forth at Idaho Code § 42-202B(5) and "service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes within the municipality's corporate limits or other recognized boundaries, including changes therein after a water right is developed. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for such outside areas share a common water

distribution system with lands located within the corporate limits.

(6) (A) Water rights other than those described in paragraphs (3) through (5) above claimed or applied for after the effective date of the Stipulation:

(i) with a total combined diversion of 150 cfs (including not more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre), when the mean daily discharge at the Shoup gage is $< 1,280$ cfs. The specific acres to be irrigated each year will be identified to the IDWR by March 1 of each year, i.e., if a portion of the acreage permitted within this 150 cfs is to be idled for a year or more, an equal number of acres permitted for irrigation within the 225 cfs in subparagraph (ii) below can be substituted to take advantage of the subordination when the river is less than 1,280 cfs for the period of years the original acres are idled.

(ii) an additional diversion of 225 cfs (including up to an additional 10,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre) when the mean daily discharge at the Shoup gage is $\geq 1,280$ cfs.

(iii) These subordinated amounts do not include storage, other than incidental storage, which is defined as storage of not more than a 24 hour water supply for any beneficial use.

(B) The subordinated amounts identified in subparagraph (A) above apply to all diversions in the Salmon River basin above the ending point of this federal reserved water right, including diversions downstream from the Shoup gage, but excluding diversions in the Middle Fork Salmon River basin.

(C) Water rights of the United States, instream flow water rights, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amounts identified in this paragraph (5) for future rights. Nonconsumptive water rights mean all beneficial uses of water having these characteristics: i) the use involves no diversion from the designated reach of the Wild and Scenic River as identified in this Partial Decree; ii) all return flows from the use accrue to the Wild and Scenic reach; and iii) the use does not cause a depletion or a change in timing of the flow (other than incidental evaporation or seepage) as determined at the point(s) of return, whether or not the depletion or change in timing can be measured within the designated reach. Examples of such uses include: i) run-of-the-river hydroelectric facilities; ii) fish propagation uses; and iii) other similar uses. Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.


c. The administrative provisions of paragraph 3 of the Stipulation are incorporated herein by reference.

d. These additional provisions contained in element 10 do not fall within the other elements listed above and are necessary to: (1) define the unique characteristics of these federal reserved water rights; and (2) describe the rights and uses to which these federal reserved water rights are subordinated in order to provide for proper administration

of these water rights and other existing and future water rights.

IT IS SO ORDERED.

DATED November 16, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS, IDAHO

FILED
 TWIN FALLS CO., IDAHO
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IN RE SRBA)
)
 CASE NO. 39576)
)
 _____)

PARTIAL DECREE FOR
Federal Reserved Water Right 77-13844
Middle Fork Salmon Wild and Scenic River

1. Name and address of owner: UNITED STATES OF AMERICA, on behalf of the
 U.S.D.A. Forest Service
 550 W. Fort Street, MSC033
 Boise, ID 83724
2. Source of water: Middle Fork Salmon River
3. Quantity of right:
 - a. When the stream flow at the Middle Fork Salmon River quantification site as defined in Section 3.d. below ("Middle Fork Salmon gage") is less than 14,400 cfs the United States is entitled to the following flows:

Period of Use	Discharge (cfs)	Period of Use	Discharge (cfs)
January 1-15	959	July 1-15	5170
January 16-31	1010	July 16-31	2550
February 1-15	1150	August 1-15	1790
February 16-28(29)	1150	August 16-31	1530
March 1-15	1150	September 1-15	1340
March 16-31	1500	September 16-30	1470
April 1-15	1500	October 1-15	1380
April 16-30	3510	October 16-31	1330
May 1-15	5450	November 1-15	1320
May 16-31	9210	November 16-30	1340
June 1-15	10800	December 1-15	1130
June 16-30	8760	December 16-31	1190

- b. When the stream flow at the Middle Fork Salmon gage is greater than or equal to 14,400 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying the subordination provided in this right), the United States is entitled to all flows, up to 40,600 cfs.

c. This water right does not prohibit the appropriation, diversion and use of water within the Middle Fork Salmon River basin when the stream flow at the Middle Fork Salmon gage exceeds the flow amount in Section 3.a. and is less than 14,400 cfs.

d. The quantification site for the flows identified above is the USGS Middle Fork Salmon River measurement gage at the river's mouth near Shoup, gage number 13310199, located in SW1/4NE1/4, Sec. 33, T23N, R16E, Boise Meridian; Latitude N 45° 17' 38.0", Longitude W 114° 35' 43.0".

e. This water right precludes any diversion of water out of the watershed of the Middle Fork Salmon River Basin upstream from the ending point of the Middle Fork Salmon Wild and Scenic River at its confluence with the Salmon River, except for transfers of points of diversion from above the ending point to below the ending point.

4. Priority date:

October 2, 1968.

5. Point of diversion:

There is no diversion associated with this instream flow water right. The legal description of the beginning and ending points of the instream flow water right are as follows:

Beginning point: Origin of the Middle Fork Salmon River - NW1/4NW1/4, Sec. 23, T13N, R10E, Boise Meridian; Latitude N 44° 26' 57.0", Longitude W 115° 13' 47.9".

Ending point: Confluence with Salmon River - NE1/4NE1/4, Sec. 33, T23N, R16E, Boise Meridian; Latitude N 45° 17' 50.1", Longitude W 114° 35' 32.8".

6. Purpose of use:

To fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.).

7. Period of use:

01-01 to 12-31.

8. Place of use:

This instream flow water right is used throughout the designated Middle Fork Salmon Wild and Scenic River

9. Annual volume of consumptive use:

10. Other provisions necessary for definition or administration of this water right:

from the beginning point to the ending point as identified above.

This instream flow water right is non-consumptive (other than evaporation and evapotranspiration which may take place within the designated segment).

a. This is a federal reserved water right based on the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.).

b. This Partial Decree is entered pursuant to that Stipulation among the United States, the State of Idaho and other objectors effective September 1, 2003 (the "Stipulation"), and pursuant to that Stipulation this water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and places of use within the Middle Fork Salmon River Basin upstream from the ending point, as identified in element 5 above:

(1) All water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.

(2) All applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation.

(3) All domestic uses, which for purposes of this Partial Decree shall be defined as set forth at I.C. § 42-111(1)(a) & (b) to mean the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day

or any other uses, if the total does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day, provided that this domestic use subordination is limited and defined by I.C. 42-111(2), so that the subordination shall not and does not apply to multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in I.C. 42-111(1)(b) (0.04 cfs/2,500 gpd), and by I.C. 42-111(3), so that the subordination shall not and does not apply to multiple water rights for domestic uses which satisfy a single combined water use that would not itself come within the above definition of domestic use.

(4) All de minimus stockwater uses, which for the purposes this Partial Decree shall be defined as set forth at I.C. § 42-1401A(11) to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. This de minimus stockwater use subordination is limited and defined by I.C. § 42-111(3), so that the subordination shall not and does not apply to multiple water rights for stockwater uses which satisfy a single combined water use that would not itself come within the above definition of stockwater use.

(5) (A) Water rights other than those described in paragraphs (3) and (4) above claimed or applied for after the effective date of the Stipulation with a total combined diversion of 60 cfs, provided that this amount shall include rights for irrigation of no more than 2,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre. This subordinated amount does not include storage, other than incidental storage, which is defined as storage of not more than a 24-hour water supply for any beneficial use.

(B) In addition to the 60 cfs of subordination specified in subparagraph (A), above, a combined

total of 5 cfs of diversions within (i) the east side of Monumental Creek basin upstream from and including the Mule Creek basin, to and including the Coon Creek basin; (ii) the west side of Marble Creek basin upstream from and including the Cornish Creek basin to and including the Sunnyside Creek basin; all as described on the map attached as Exhibit A, for any commercial or industrial uses, including storage of any portion of such 5 cfs for commercial or industrial use, provided that the total cumulative storage reservoir capacity established under the subordination described in this subparagraph (B) shall not be greater than 100 acre-feet.

(C) Water rights of the United States, instream flow water rights, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amounts identified in this paragraph (5) for future rights. Nonconsumptive water rights mean all beneficial uses of water having these characteristics: i) the use involves no diversion from the designated reach of the Wild and Scenic River as identified in this Partial Decree; ii) all return flows from the use accrue to the Wild and Scenic reach; and iii) the use does not cause a depletion or a change in timing of the flow (other than incidental evaporation or seepage) as determined at the point(s) of return, whether or not the depletion or change in timing can be measured within the designated reach. Examples of such uses include: i) run-of-the-river hydroelectric facilities; ii) fish propagation uses; and iii) other similar uses. Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water

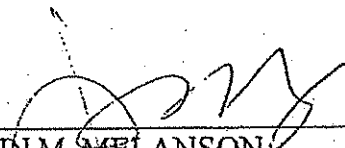
would not be legally and physically available under the original water right.

c. The administrative provisions of paragraph 3 of the Stipulation are incorporated herein by reference.

d. These additional provisions contained in element 10 do not fall within the other elements listed above and are necessary to: (1) define the unique characteristics of these federal reserved water rights; and (2) describe the rights and uses to which these federal reserved water rights are subordinated in order to provide for proper administration of these water rights and other existing and future water rights.

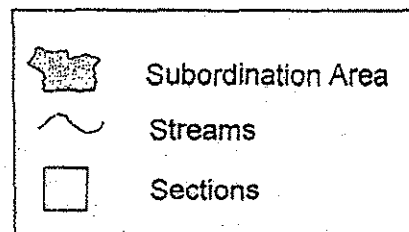
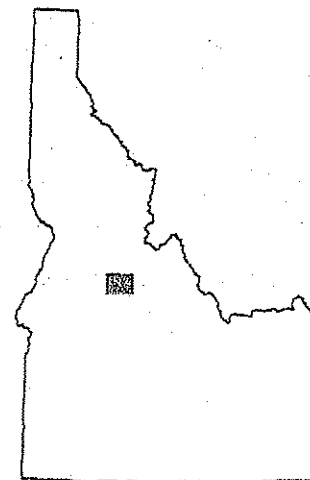
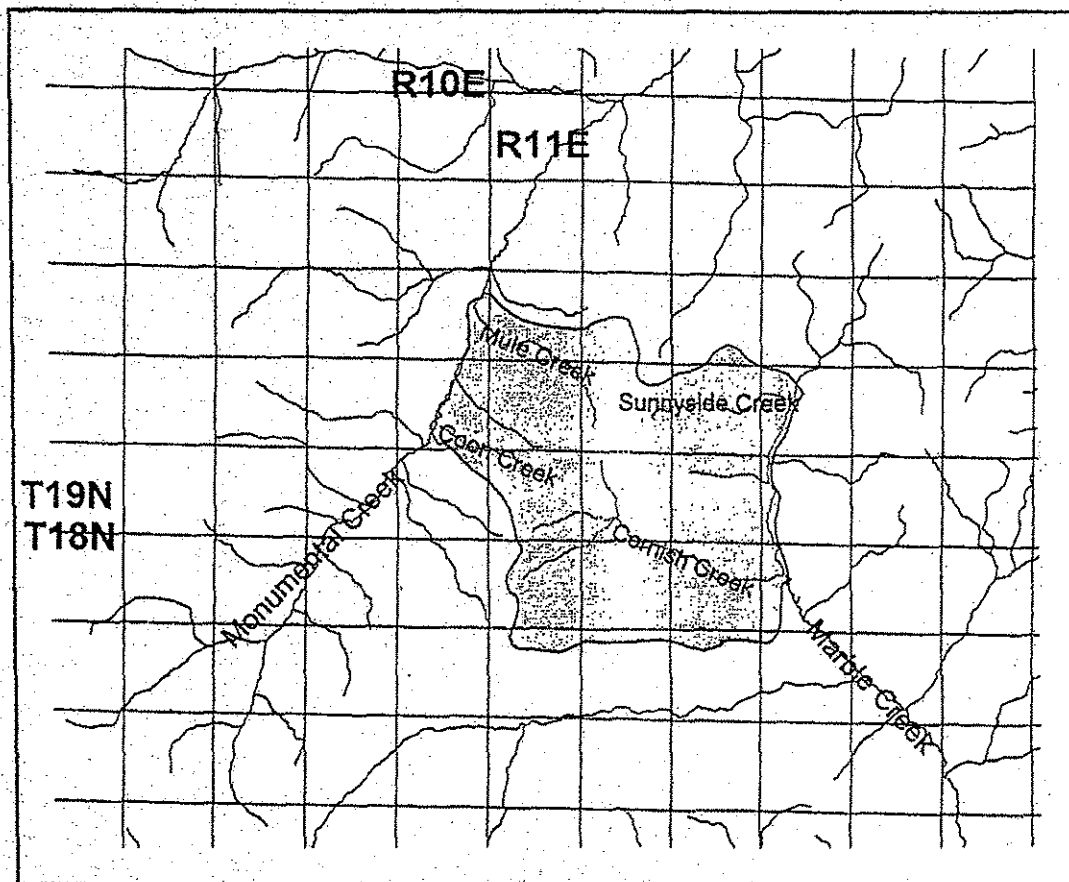
IT IS SO ORDERED.

DATED November 16, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

Exhibit A
Area Pertaining to Subordinations Under Element
10.b.(5).B of Middle Fork Salmon Partial Decree
77-13844



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

FILED

IN RE SRBA)
CASE NO. 39576)
_____)

PARTIAL DECREE FOR

Federal Reserved Water Rights 78-11961
Rapid Wild and Scenic River (including West Fork)

1. Name and address of owner: UNITED STATES OF AMERICA, on behalf of the U.S.D.A. Forest Service
550 W. Fort Street, MSC033
Boise, ID 83724
2. Source of water: Rapid River and West Fork Rapid River
3. Quantity of right:
 - a. When the stream flow at the Rapid River quantification site as defined in Section 3.d. below ("Rapid River gage") is less than 625 cfs, the United States is entitled to the following flows:

Period of Use	Discharge (cfs)	Period of Use	Discharge (cfs)
January 1-15	73	July 1-15	281
January 16-31	73	July 16-31	175
February 1-15	66	August 1-15	160
February 16-28(29)	63	August 16-31	136
March 1-15	75	September 1-15	124
March 16-31	99	September 16-30	118
April 1-15	109	October 1-15	108
April 16-30	160	October 16-31	97
May 1-15	249	November 1-15	87
May 16-31	403	November 16-30	88
June 1-15	524	December 1-15	73
June 16-30	432	December 16-31	78

- b. When the stream flow at the Rapid River gage is greater than or equal to 625 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying the subordination provided in this right), the United States is entitled to all flows, up to 2,160 cfs.

c. This water right does not prohibit the appropriation, diversion and use of water within the Rapid River basin upstream from the ending point of the Rapid Wild and Scenic River at the National Forest Boundary when the stream flow at the Rapid River gage exceeds the flow amount in Section 3.a. and is less than 625 cfs.

d. The quantification site for the flows identified above is the USDA Forest Service gage located in NE1/4NE1/4, Sec. 12, T23N, R1W, Boise Meridian; Latitude N 45° 21' 7.1", Longitude W 116° 23' 49.5".

e. This water right precludes any diversion of water out of the watershed of the Rapid Wild River Basin upstream from the ending point of the Rapid Wild and Scenic River at the National Forest boundary as described below, except for transfers of points of diversion from above the ending point to below the ending point.

4. Priority date:

December 31, 1975.

5. Point of diversion:

There is no diversion associated with this instream flow water right. The legal description of the beginning and ending points of the instream flow water right are as follows:

Main Stem Rapid River:

Beginning point: Headwaters of the main stem Rapid River -- NE1/4SW1/4, Sec. 31, T21N, R1W, Boise Meridian; Latitude N 45° 06' 49.0", Longitude W 116° 30' 23.2".

Ending point: National Forest boundary -- NE1/4NE1/4, Sec. 12, T23N, R1W, Boise Meridian; Latitude N 45° 21' 14.0", Longitude W 116° 23' 31.8".

West Fork Rapid River:

Beginning point: Wilderness boundary -- NW1/4SW1/4, Sec. 1, T22N, R2W, Boise Meridian; Latitude N 45° 16' 19.1", Longitude W 116° 32' 1.4".

Ending point: Confluence with the main stem Rapid River
– SW1/4NE1/4, Sec. 26, T23N, R1W, Boise Meridian;
Latitude N 45° 18' 25.0", Longitude W 116° 25' 8.4".

6. Purpose of use:

To fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.), and the Hells Canyon National Recreation Area Act, Pub.L. 94-199, 89 Stat. 1117, Dec. 31, 1975 (codified as amended at 16 U.S.C. §§ 460gg-469gg-13).

7. Period of use:

01-01 to 12-31.

8. Place of use:

This instream flow water right is used throughout the designated Rapid Wild and Scenic River (including West Fork) from the beginning points to the ending points as identified above.

9. Annual volume of consumptive use:

This instream flow water right is non-consumptive (other than evaporation and evapotranspiration which may take place within the designated segment).

10. Other provisions necessary for definition or administration of this water right:

a. This is a federal reserved water right based on the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.), and the Hells Canyon National Recreation Area Act, Pub.L. 94-199, 89 Stat. 1117, Dec. 31, 1975 (codified as amended at 16 U.S.C. §§ 460gg-469gg-13).

b. This Partial Decree is entered pursuant to that Stipulation among the United States, the State of Idaho and other objectors effective September 1, 2003 (the "Stipulation"), and pursuant to that Stipulation this water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and places of use within the Rapid River Basin upstream from the ending point, as identified in element 5 above:

(1) All water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.

(2) All applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation.

(3) All domestic uses, which for purposes of this Partial Decree shall be defined as set forth at I.C. § 42-111(1)(a) & (b) to mean the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day or any other uses, if the total does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day, provided that this domestic use subordination is limited and defined by I.C. 42-111(2), so that the subordination shall not and does not apply to multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in I.C. 42-111(1)(b) (0.04 cfs/2,500 gpd), and by I.C. 42-111(3), so that the subordination shall not and does not apply to multiple water rights for domestic uses which satisfy a single combined water use that would not itself come within the above definition of domestic use.

(4) All de minimus stockwater uses, which for the purposes this Partial Decree shall be defined as set forth at I.C. § 42-1401A(11) to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. This de minimus stockwater use subordination is limited and defined by I.C. § 42-111(3), so that the subordination shall not and does not apply to multiple water rights for stockwater uses which satisfy a single combined

water use that would not itself come within the above definition of stockwater use.

(5) (A) Water rights other than those described in paragraphs (3) and (4) above claimed or applied for after the effective date of the Stipulation with a total combined diversion of 10 cfs (including not more than 300 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre. This subordinated amount does not include storage, other than incidental storage, which is defined as storage of not more than a 24 hour water supply for any beneficial use.

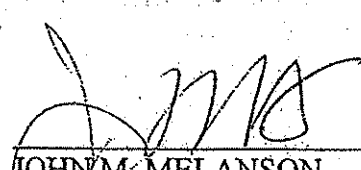
(B) Water rights of the United States, instream flow water rights, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amounts identified in this paragraph (5) for future rights. Nonconsumptive water rights mean all beneficial uses of water having these characteristics: i) the use involves no diversion from the designated reach of the Wild and Scenic River as identified in this Partial Decree; ii) all return flows from the use accrue to the Wild and Scenic reach; and iii) the use does not cause a depletion or a change in timing of the flow (other than incidental evaporation or seepage) as determined at the point(s) of return, whether or not the depletion or change in timing can be measured within the designated reach. Examples of such uses include: i) run-of-the-river hydroelectric facilities; ii) fish propagation uses; and iii) other similar uses. Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.

c. The administrative provisions of paragraph 3 of the Stipulation are incorporated herein by reference.

d. These additional provisions contained in element 10 do not fall within the other elements listed above and are necessary to: (1) define the unique characteristics of these federal reserved water rights; and (2) describe the rights and uses to which these federal reserved water rights are subordinated in order to provide for proper administration of these water rights and other existing and future water rights.

IT IS SO ORDERED.

DATED November 16, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS, IDAHO

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 TWIN FALLS CO., IDAHO
 FILED

IN RE SRBA)
)
 CASE NO. 39576)
)
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PARTIAL DECREE FOR
 Federal Reserved Water Right 81-10472
 Selway Wild and Scenic River

1. Name and address of owner: UNITED STATES OF AMERICA, on behalf of the
 U.S.D.A. Forest Service
 550 W. Fort Street, MSC033
 Boise, ID 83724
2. Source of water: Selway River
3. Quantity of right:
 - a. When the stream flow at the Selway River quantification site as defined in Section 3.d. below ("Selway gage") is less than 23,700 cfs, the United States is entitled to the following flow:

Period of Use	Discharge (cfs)	Period of Use	Discharge (cfs)
January 1-15	1670	July 1-15	5840
January 16-31	1670	July 16-31	2490
February 1-15	1670	August 1-15	1350
February 16-28(29)	1670	August 16-31	1000
March 1-15	1670	September 1-15	852
March 16-31	2220	September 16-30	960
April 1-15	5840	October 1-15	1080
April 16-30	9470	October 16-31	1310
May 1-15	13300	November 1-15	1660
May 16-31	19400	November 16-30	1740
June 1-15	19400	December 1-15	1670
June 16-30	13300	December 16-31	1670

- b. When the stream flow at the Selway gage is greater than or equal to 23,700 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying the subordination provided in this right), the United States is entitled to all flows, up to 51,400 cfs.

c. This water right does not prohibit the appropriation, diversion and use of water within the Selway River basin when the stream flow at the Selway gage exceeds the flow amount in Section 3.a. and is less than 23,700 cfs.

d. The quantification site for the flows identified above is the USGS Selway River near Lowell gage, number 13336500, located in SE1/4NE1/4, Sec. 25, T32N, R7E, Boise Meridian; Latitude N 46° 05' 11.6", Longitude W 115° 30' 46.3".

e. This water right precludes any diversion of water out of the watershed of the Selway River Basin upstream from the ending point of the Selway Wild and Scenic River at its confluence with the Lochsa River at Lowell, except for transfers of points of diversion from above the ending point to below the ending point.

4. Priority date:

October 2, 1968.

5. Point of diversion:

There is no diversion associated with this instream flow water right. The legal description of the beginning and ending points of the instream flow water right are as follows:

Beginning point: Origin of the Selway River -- SW1/4NE1/4, Sec. 21, T25N, R14E, Boise Meridian; Latitude N 45° 29' 45.8", Longitude W 114° 44' 34.8".

Ending point: Confluence with the Lochsa River at Lowell -- NW1/4SW1/4, Sec. 4, T32N, R7E, Boise Meridian; Latitude N 46° 08' 25.0", Longitude W 115° 35' 54.8".

6. Purpose of use:

To fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.).

7. Period of use:

01-01 to 12-31.

8. Place of use:

This instream flow water right is used throughout the designated Selway Wild and Scenic River from the beginning point to the ending point as identified above.

9. Annual volume of consumptive use:

This instream flow water right is non-consumptive (other than evaporation and evapotranspiration which may take place within the designated segment).

10. Other provisions necessary for definition or administration of this water right:

a. This is a federal reserved water right based on the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.).

b. This Partial Decree is entered pursuant to that Stipulation among the United States, the State of Idaho and other objectors effective September 1, 2003 (the "Stipulation"), and pursuant to that Stipulation this water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and places of use within the Selway River Basin upstream from the ending point, as described in element 5 above:

(1) All water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.

(2) All applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation.

(3) All domestic uses, which for purposes of this Partial Decree shall be defined as set forth at I.C. § 42-111(1)(a) & (b) to mean the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day or any other uses, if the total does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day, provided that this

domestic use subordination is limited and defined by I.C. 42-111(2), so that the subordination shall not and does not apply to multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in I.C. 42-111(1)(b) (0.04 cfs/2,500 gpd), and by I.C. 42-111(3), so that the subordination shall not and does not apply to multiple water rights for domestic uses which satisfy a single combined water use that would not itself come within the above definition of domestic use.

(4) All de minimus stockwater uses, which for the purposes this Partial Decree shall be defined as set forth at I.C. § 42-1401A(11) to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. This de minimus stockwater use subordination is limited and defined by I.C. § 42-111(3), so that the subordination shall not and does not apply to multiple water rights for stockwater uses which satisfy a single combined water use that would not itself come within the above definition of stockwater use.

(5) (A) Water rights other than those described in paragraphs (3) and (4) above claimed or applied for after the effective date of the Stipulation with a total combined diversion of 40 cfs (including not more than 500 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre and no storage other than incidental storage). This subordinated amount does not include storage, other than incidental storage, which is defined as storage of not more than a 24 hour water supply for any beneficial use.

(B) Water rights of the United States, instream flow water rights, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amounts identified in this paragraph (5) for future rights. Nonconsumptive water rights mean all beneficial uses of water having these characteristics: i) the use involves no diversion from the designated reach of

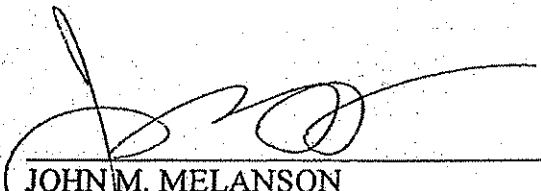
the Wild and Scenic River as identified in this Partial Decree; ii) all return flows from the use accrue to the Wild and Scenic reach; and iii) the use does not cause a depletion or a change in timing of the flow (other than incidental evaporation or seepage) as determined at the point(s) of return, whether or not the depletion or change in timing can be measured within the designated reach. Examples of such uses include: i) run-of-the-river hydroelectric facilities; ii) fish propagation uses; and iii) other similar uses. Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.

c. The administrative provisions of paragraph 3 of the Stipulation are incorporated herein by reference.

d. These additional provisions contained in element 10 do not fall within the other elements listed above and are necessary to: (1) define the unique characteristics of these federal reserved water rights; and (2) describe the rights and uses to which these federal reserved water rights are subordinated in order to provide for proper administration of these water rights and other existing and future water rights.

IT IS SO ORDERED.

DATED November 16th, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

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STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS, ONT-SRBA

TWIN FALLS CO., IDAHO

FILED

IN RE SRBA)

PARTIAL DECREE FOR

CASE NO. 39576)

Federal Reserved Water Right 81-10513

Lochsa Wild and Scenic River

1. Name and address of owner: UNITED STATES OF AMERICA, on behalf of the
U.S.D.A. Forest Service
550 W. Fort Street, MSC033
Boise, ID 83724

2. Source of water: Lochsa River

3. Quantity of right: a. When the stream flow at the Lochsa River quantification site as defined in Section 3.d. below ("Lochsa gage") is less than 18,600 cfs, the United States is entitled to the following flow:

Period of Use	Discharge (cfs)	Period of Use	Discharge (cfs)
January 1-15	933	July 1-15	3600
January 16-31	933	July 16-31	1400
February 1-15	933	August 1-15	989
February 16-28(29)	933	August 16-31	743
March 1-15	933	September 1-15	646
March 16-31	2750	September 16-30	719
April 1-15	4620	October 1-15	855
April 16-30	8030	October 16-31	933
May 1-15	10300	November 1-15	933
May 16-31	17600	November 16-30	933
June 1-15	13600	December 1-15	933
June 16-30	8030	December 16-31	933

b. When the stream flow at the Lochsa gage is greater than or equal to 18,600 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying the subordination provided in this right), the United States is entitled to all flows, up to 39,300 cfs.

c. This water right does not prohibit the appropriation, diversion and use of water within the Lochsa River basin when the stream flow at the Lochsa gage exceeds the flow amount in Section 3.a. and is less than 18,600 cfs.

d. The quantification site for the flows identified above is the USGS Lochsa River near Lowell gage, number 13337000, located in SW1/4SE1/4, Sec. 33, T33N, R7E, Boise Meridian; Latitude N 46° 09' 2.1", Longitude W 115° 35' 10.6".

e. This water right precludes any diversion of water out of the watershed of the Lochsa River Basin, upstream from the ending point of the Lochsa Wild and Scenic River at its confluence with the Selway River at Lowell, except for transfers of points of diversion from above the ending point to below the ending point.

4. Priority date:

October 2, 1968.

5. Point of diversion:

There is no diversion associated with this instream flow water right. The legal description of the beginning and ending points of the instream flow water right are as follows:

Beginning point: Powell Ranger Station (USDA Forest Service) -- SW1/4NW1/4, Sec. 33, T37N, R14E, Boise Meridian; Latitude N 46° 30' 33.1", Longitude W 114° 42' 43.1".

Ending point: Confluence with the Selway River at Lowell -- NW1/4SW1/4, Sec. 4, T32N, R7E, Boise Meridian; Latitude N 46° 08' 25.0", Longitude W 115° 35' 54.8".

6. Purpose of use:

To fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.).

7. Period of use:

01-01 to 12-31.

8. Place of use:

This instream flow water right is used throughout the designated Lochsa Wild and Scenic River from the beginning point to the ending point as identified above.

9. Annual volume of consumptive use:

This instream flow water right is non-consumptive (other than evaporation and evapotranspiration which may take place within the designated segment).

10. Other provisions necessary for definition or administration of this water right:

a. This is a federal reserved water right based on the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.).

b. This Partial Decree is entered pursuant to that Stipulation among the United States, the State of Idaho and other objectors effective September 1, 2003 (the "Stipulation"), and pursuant to that Stipulation this water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and places of use within the Lochsa River Basin upstream from the ending point, as identified in element 5 above:

(1) All water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.

(2) All applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation.

(3) All domestic uses, which for purposes of this Partial Decree shall be defined as set forth at I.C. § 42-111(1)(a) & (b) to mean the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day or any other uses, if the total does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day, provided that this

domestic use subordination is limited and defined by I.C. 42-111(2), so that the subordination shall not and does not apply to multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in I.C. 42-111(1)(b) (0.04 cfs/2,500 gpd), and by I.C. 42-111(3), so that the subordination shall not and does not apply to multiple water rights for domestic uses which satisfy a single combined water use that would not itself come within the above definition of domestic use.

(4) All de minimus stockwater uses, which for the purposes this Partial Decree shall be defined as set forth at I.C. § 42-1401A(11) to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. This de minimus stockwater use subordination is limited and defined by I.C. § 42-111(3), so that the subordination shall not and does not apply to multiple water rights for stockwater uses which satisfy a single combined water use that would not itself come within the above definition of stockwater use.

(5) (A) Water rights other than those described in paragraphs (3) and (4) above claimed or applied for after the effective date of the Stipulation with a total combined diversion of 40 cfs (including not more than 500 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre. This subordinated amount does not include storage, other than incidental storage, which is defined as storage of not more than a 24 hour water supply for any beneficial use.

(B) Water rights of the United States, instream flow water rights, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amounts identified in this paragraph (5) for future rights. Nonconsumptive water rights mean all beneficial uses of water having these characteristics: i) the use involves no diversion from the designated reach of

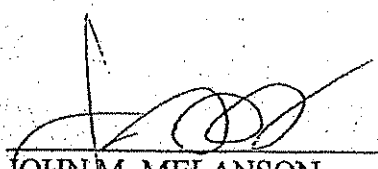
the Wild and Scenic River as identified in this Partial Decree; ii) all return flows from the use accrue to the Wild and Scenic reach; and iii) the use does not cause a depletion or a change in timing of the flow (other than incidental evaporation or seepage) as determined at the point(s) of return, whether or not the depletion or change in timing can be measured within the designated reach. Examples of such uses include: i) run-of-the-river hydroelectric facilities; ii) fish propagation uses; and iii) other similar uses. Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.

c. The administrative provisions of paragraph 3 of the Stipulation are incorporated herein by reference.

d. These additional provisions contained in element 10 do not fall within the other elements listed above and are necessary to: (1) define the unique characteristics of these federal reserved water rights; and (2) describe the rights and uses to which these federal reserved water rights are subordinated in order to provide for proper administration of these water rights and other existing and future water rights.

IT IS SO ORDERED.

DATED November 16, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS.

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AT-SRB
TWIN FALLS CO., IDAH
FILED

IN RE SRBA)
)
CASE NO. 39576)
)
_____)

PARTIAL DECREE FOR

Federal Reserved Water Right 81-10625

Middle Fork Clearwater Wild and Scenic River

1. Name and address of owner: UNITED STATES OF AMERICA, on behalf of the
U.S.D.A. Forest Service
550 W. Fort Street, MSC033
Boise, ID 83724
2. Source of water: Middle Fork Clearwater River
3. Quantity of right:
 - a. When the stream flow at the Middle Fork Clearwater River quantification site as defined in Section 3.d. below ("Middle Fork Clearwater site") is less than 37,900 cfs, the United States is entitled to the following flows:

Period of Use	Discharge (cfs)	Period of Use	Discharge (cfs)
January 1-15	2070	July 1-15	6250
January 16-31	2070	July 16-31	3100
February 1-15	2070	August 1-15	2320
February 16-28(29)	2070	August 16-31	1730
March 1-15	2070	September 1-15	1480
March 16-31	4040	September 16-30	1660
April 1-15	6850	October 1-15	1920
April 16-30	12700	October 16-31	2070
May 1-15	18200	November 1-15	2070
May 16-31	25100	November 16-30	2070
June 1-15	22000	December 1-15	2070
June 16-30	13000	December 16-31	2070

- b. When the stream flow at the Middle Fork Clearwater site is greater than or equal to 37,900 cfs (as adjusted by upstream junior depletions, including depletions from water rights enjoying the subordination provided in this right), the United States is entitled to all flows, up to 80,700 cfs.

c. This water right does not prohibit the appropriation, diversion and use of water within the Middle Fork Clearwater River basin upstream from the ending point of the Middle Fork Clearwater Wild and Scenic River at the town of Kooskia when the stream flow at the Middle Fork Clearwater site exceeds the flow amount in Section 3.a. and is less than 37,900 cfs.

d. The quantification site for the flows identified above is at or above the ending point described below, either; based on the sum of the discharges measured at the USGS Lochsa River near Lowell gage, number 13337000, located in SW1/4SE1/4, Sec. 33, T33N, R7E, Boise Meridian; Latitude N 46° 09' 2.1", Longitude W 115° 35' 10.6", and at the USGS Selway River near Lowell gage, number 13336500, located in SE1/4NE1/4, Sec. 25, T32N, R7E, Boise Meridian; Latitude N 46° 05' 11.6", Longitude W 115° 30' 46.3", or the discharge measured at a new stream gage to be established in the vicinity of the ending point described below.

e. This water right precludes any diversion of water out of the watershed of the Middle Fork Clearwater River Basin upstream from the ending point of the Middle Fork Clearwater Wild and Scenic River at the town of Kooskia, except for transfers of points of diversion from above the ending point to below the ending point.

4. Priority date:

October 2, 1968.

5. Point of diversion:

There is no diversion associated with this instream flow water right. The legal description of the beginning and ending points of the instream flow water right are as follows:

Beginning point: Confluence of the Lochsa and Selway Rivers at the town of Lowell, Idaho -- NW1/4SW1/4, Sec. 4, T32N, R7E, Boise Meridian; Latitude N 46° 08' 25.0", Longitude W 115° 35' 54.8".

Ending point: Town of Kooskia, Idaho -- NE1/4SW1/4, Sec. 4, T32N, R4E, Boise Meridian; Latitude N 46° 08' 26.6", Longitude W 115° 57' 54.5".

- 6. Purpose of use:** To fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.).
- 7. Period of use:** 01-01 to 12-31.
- 8. Place of use:** This instream flow water right is used throughout the designated Middle Fork Clearwater Wild and Scenic River from the beginning point to the ending point as identified above.
- 9. Annual volume of consumptive use:** This instream flow water right is non-consumptive (other than evaporation and evapotranspiration which may take place within the designated segment).
- 10. Other provisions necessary for definition or administration of this water right:**
- a. This is a federal reserved water right based on the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.).
 - b. This Partial Decree is entered pursuant to that Stipulation among the United States, the State of Idaho and other objectors effective September 1, 2003 (the "Stipulation"), and pursuant to that Stipulation this water right is subordinated to the following water rights and uses that are junior to this federal reserved water right and that have points of diversion or impoundment and places of use within the Middle Fork Clearwater River Basin upstream from the ending point, as described in element 5 above:
 - (1) All water right claims filed in the Snake River Basin Adjudication (SRBA) as of the effective date of the Stipulation to the extent ultimately decreed in the SRBA.
 - (2) All applications for permit and permits with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation, to the extent such applications for permit or permits are ultimately licensed; and all water right licenses with proof of beneficial use due after November 19, 1987, on file with IDWR as of the effective date of the Stipulation.

(3) All domestic uses, which for purposes of this Partial Decree shall be defined as set forth at I.C. § 42-111(1)(a) & (b) to mean the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen-thousand (13,000) gallons per day or any other uses, if the total does not exceed a diversion rate of four one-hundreds (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day, provided that this domestic use subordination is limited and defined by I.C. 42-111(2), so that the subordination shall not and does not apply to multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in I.C. 42-111(1)(b) (0.04 cfs/2,500 gpd), and by I.C. 42-111(3), so that the subordination shall not and does not apply to multiple water rights for domestic uses which satisfy a single combined water use that would not itself come within the above definition of domestic use.

(4) All de minimus stockwater uses, which for the purposes this Partial Decree shall be defined as set forth at I.C. § 42-1401A(11) to mean the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen-thousand (13,000) gallons per day. This de minimus stockwater use subordination is limited and defined by I.C. § 42-111(3), so that the subordination shall not and does not apply to multiple water rights for stockwater uses which satisfy a single combined water use that would not itself come within the above definition of stockwater use.

(5) (A) Water rights other than those described in paragraphs (3) and (4) above claimed or applied for after the effective date of the Stipulation with a total combined diversion of 40 cfs (including not more than 500 acres of irrigation with a maximum

diversion rate of 0.02 cfs/acre. The 40 cfs of diversion and not more than 500 acres of irrigation are in addition to the 40 cfs of diversion and not more than 500 acres of irrigation from each, the Selway and Lochsa Rivers upstream from their confluence with the Middle Fork Clearwater River. This subordinated amount does not include storage, other than incidental storage, which is defined as storage of not more than a 24 hour water supply for any beneficial use.

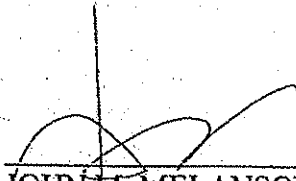
(B) Water rights of the United States, instream flow water rights, nonconsumptive water rights and replacement water rights shall not be deducted from the subordination amounts identified in this paragraph (5) for future rights. Nonconsumptive water rights mean all beneficial uses of water having these characteristics: i) the use involves no diversion from the designated reach of the Wild and Scenic River as identified in this Partial Decree; ii) all return flows from the use accrue to the Wild and Scenic reach; and iii) the use does not cause a depletion or a change in timing of the flow (other than incidental evaporation or seepage) as determined at the point(s) of return, whether or not the depletion or change in timing can be measured within the designated reach. Examples of such uses include: i) run-of-the-river hydroelectric facilities; ii) fish propagation uses; and iii) other similar uses. Replacement water rights means all irrigation appropriations issued for the same purpose of use and place of use covered by an existing water right with no increase in period of use, diversion rate, and, if applicable, volume of water. To be considered a replacement water right: i) no element of the new appropriation may exceed that of the original water right; ii) only the original or the replacement water right or part of each water right may be used at the same time; and iii) the replacement water right cannot be used when water would not be legally and physically available under the original water right.

c. The administrative provisions of paragraph 3 of the Stipulation are incorporated herein by reference.

d. These additional provisions contained in element 10 do not fall within the other elements listed above and are necessary to: (1) define the unique characteristics of these federal reserved water rights; and (2) describe the rights and uses to which these federal reserved water rights are subordinated in order to provide for proper administration of these water rights and other existing and future water rights.

IT IS SO ORDERED.

DATED November 16, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

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McIntosh, Thompson, Bennett, Padden and Field

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RINGERT CLARK

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DISTRICT COURT
TWIN FALLS CO.,
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE: SRBA

)
)
) Consolidated Subcase No. 75-13316

) Wild & Scenic Rivers Act Claims

) (Encompassing Subcases 75-13316, 77-11941, 77-13844

) 78-11961, 81-10472, 81-10513 and 81-10625)

CASE NO. 39576

) Amended Order Approving Stipulation and
) Entry of Partial Decrees
)
)
)
)

The District Court of the Fifth Judicial District in and for the County of Twin Falls, having entered its Commencement Order on November 19, 1987, commencing the Snake River Basin Adjudication ("SRBA"); the United States of America, the State of Idaho and the other objectors to these consolidated subcases, through their respective counsel, having presented a Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, with the effective date of September 1, 2003 ("Stipulation"); due notice of the requested approval of the Stipulation and the proposed entry of the Partial Decrees having been given pursuant to the Idaho Rules of Civil Procedure and the SRBA Court Administrative Order I; a timely objection having been filed by Thompson Creek Mining Company ("Thompson Creek"); Thompson Creek's objection having been resolved by agreement as to the form of this Order; the Court having reviewed the Stipulation, the proposed Partial Decrees and supporting affidavits and

AMENDED ORDER APPROVING STIPULATION AND ENTRY OF PARTIAL DECREES

having heard the parties concerning these matters;

THE SRBA DISTRICT COURT NOW FINDS AS FOLLOWS:

The parties have satisfied the requirements of Chapter 14, Title 42, Idaho Code, including Section 42-1411A, the Idaho Rules of Civil Procedure and SRBA Administrative Order 1. The Stipulation is a fair and equitable settlement of all the United States' claims in the SRBA for federally designated Wild and Scenic Rivers. The Stipulation does not adversely affect the interests of persons not party to the Stipulation and good cause has been shown for granting the Joint Motion for Order Approving Stipulation and Entry of Partial Decrees.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Partial Decrees for the United States' Wild and Scenic Rivers Act federal reserved water rights claims numbered 75-13316, 77-11941, 77-13844, 78-11961, 81-10472, 81-10513 and 81-10625, as attached to the Stipulation (the "Partial Decrees"), are hereby ratified, confirmed and approved. The Court shall retain jurisdiction for the purpose of resolving disputes regarding the interpretation and implementation of the Partial Decrees.

2. The Stipulation is hereby approved, provided, that the provisions of paragraph 2 of the Stipulation ("paragraph 2") that address administration of water rights are covenants among the signatory parties only and shall not be binding on this Court or non-signatory parties with regard to administration of water rights by IDWR. The Court retains jurisdiction for the purpose of resolving disputes among the signatory parties regarding the implementation and enforcement of the Stipulation. The provisions of paragraph 2 shall not affect the rights of Thompson Creek or any other non-signatory party to participate in and object to any motion for interim administration, proceeding for creation of a water district, or other administrative action

or other judicial proceeding affecting their water rights or their use, diversion, or measurement of water; nor shall the provisions of paragraph 2 affect the disposition or review of such proceedings.

3. Nothing in this Order, the Partial Decrees, or the Stipulation shall affect Thompson Creek's decreed water rights or the stipulated subordination of the United States' Partial Decree for the Main Salmon River to Thompson Creek's decreed water rights that was approved by this Court, nor shall this Order, the Partial Decrees, or the Stipulation be construed as limiting IDWR's authority to administer water rights as provided by State law.

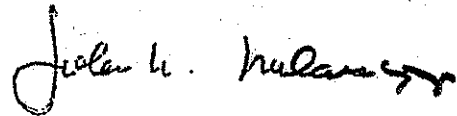
4. Pursuant to Idaho Rule of Evidence 408, nothing in the Stipulation, including the stipulated entry of Partial Decrees for these claims and any affidavits or other evidence or pleading submitted or relied upon for approval of the Stipulation, or any offers or compromises made in the course of negotiating the Stipulation, shall be construed as admissions against interest or tendered or used as evidence to support or oppose any party's claims or objections in the SRBA or in any other adjudication involving claims for the same or similar purposes, including the quantities of water claimed, or in any other manner by any party in the SRBA in any future proceedings in the SRBA, in any appellate proceedings concerning the SRBA, or in any other proceeding, other than those for interpretation, enforcement or administration of the Stipulation or the Partial Decrees or for a purpose contemplated by Rule 408. This Order is fully in accordance with Idaho Rule of Evidence 408, as well as the policy underlying that rule and the policy of the SRBA Court directed at furthering the strong public policy favoring out-of-court settlement of disputes over litigation.

5. The water rights adjudicated by the Partial Decrees are in full satisfaction of all the United States' claims in the SRBA for federally designated Wild and Scenic Rivers.

6. This *Amended Order* supercedes the *Order Approving Stipulation and Entry of Partial Decrees* dated November 16, 2004, which was issued in error.

IT IS SO ORDERED.

DATED November 17, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the AMENDED ORDER APPROVING STIPULATION AND ENTRY OF PARTIAL DECREES was mailed on November 17, 2004, with sufficient first-class postage to the following:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO AND FOR THE COUNTY OF CUSTER

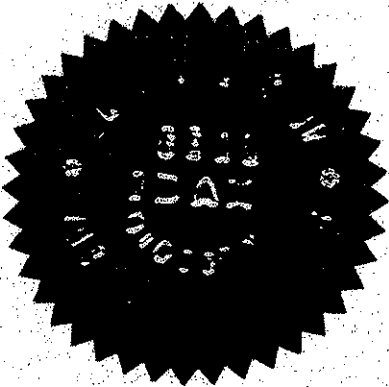
IN RE: IDAHO DEPARTMENT OF WATER)
RESOURCES AMENDED FINAL ORDER)
CREATING WATER DISTRICT NO. 170)
_____)

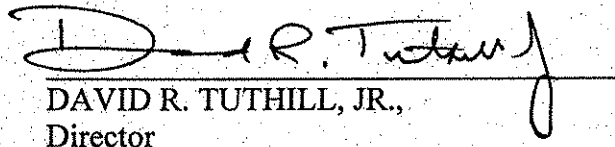
AGENCY'S CERTIFICATE
OF RECORD SECOND
ADDENDUM

STATE OF IDAHO)
County of Ada) ss

I, David R. Tuthill, Jr., Director of the Idaho Department of Water Resources, do hereby certify that the above and foregoing record second addendum in the above-entitled matter was compiled and bound under my direction, and is a true and correct record of the pleadings, papers and proceedings therein as shown in the index to this record.

IN WITNESS WHEREOF, I have hereunto set by hand and affixed the seal of the
Department of Water Resources at Boise, Idaho this 10th day of May, 2007




DAVID R. TUTHILL, JR.,
Director

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

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P.O. Box 83720
Boise, Idaho 83720-0098
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Attorneys for Respondent IDWR

CLERK OF DISTRICT COURT
CLUSTER COUNTY
IDAHO
B. Brudlow
2007 MAY 11 PM 2:13

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER**

IN RE: IDAHO DEPARTMENT OF WATER
RESOURCES AMENDED FINAL ORDER
CREATING WATER DISTRICT NO. 170

Case No. CV-2006-66

THOMPSON CREEK MINING COMPANY,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

**IDWR'S RESPONSE TO
MOTIONS TO AUGMENT
RECORD AND FOR
EXTENSION OF TIME
FOR FILING BRIEF**

COMES NOW, Respondent IDAHO DEPARTMENT OF WATER
RESOURCES ("IDWR"), pursuant to Rule 84(o) of the Idaho Rules of Civil Procedure,
and hereby responds to Petitioner THOMPSON CREEK MINING COMPANY's

("THOMPSON CREEK") April 26, 2007, Motion to Augment Record and Motion for Extension of Time for Filing Brief ("Motion").

I. INTRODUCTION

Dissatisfied with IDWR's order creating a water district, Thompson Creek seeks to augment the record with documents it did not present to the Director of IDWR for his review during the course of the water district formation proceedings. Thompson Creek requests that the Court add the new documents to the record and then rule on the merits of IDWR's order without giving IDWR an opportunity to review the documents and modify its order if necessary. The Idaho Supreme Court recently ruled that this tactic violates the statutory process for augmentation. See Crown Point Dev., Inc. v. City of Sun Valley, No. 32264, 2007 WL 936118, -- P.3d -- (Idaho Mar. 30, 2007). Thompson Creek fails to meet the requisite standards for augmenting the record.

Thompson Creek also moves for an extension of time in which to file its opening brief. IDWR does not object to Thompson Creek's motion for an extension of time.

IDWR through this response stipulates its agreement to have Exhibits J, K, N, Q and R added to the official agency record. These five exhibits were part of Thompson Creek's November 18, 2005, written comments received by IDWR in connection with the underlying proceeding and should have been included in the addendum section of the record.¹ IDWR will submit a second addendum to the agency record containing these documents. Accordingly, remand is not necessary for the augmentation of these five exhibits. This response addresses the remaining exhibits.

¹ These five documents may also be added to the record pursuant to I.C. § 67-5275(3).

II. ARGUMENT

Under the Idaho Administrative Procedure Act, the agency record constitutes “the exclusive basis” for agency action in contested cases and for judicial review, unless otherwise provided by statute. I.C. § 67-5249(3); I.R.C.P. 84(e). Judicial review is confined to the record initially created before the agency unless a petitioner seeks leave of the court to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that there were “good reasons” for failure to present the additional evidence in the proceeding before the agency. See I.C. § 67-5276. A court may then remand the matter to the agency to take the additional evidence and conduct additional fact finding. *Id.* It is not the agency who must defend the record on judicial review, but rather it is the petitioner who must demonstrate why additional documents should be included.

The law is clear when considering Thompson Creek’s motion to augment. Idaho Code § 67-5276 provides:

(1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

- (a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.
- (b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

Thus, Thompson Creek's burden under Idaho Code § 67-5276 is three-fold.² It must demonstrate to the satisfaction of the Court that the additional evidence is both material and related to the validity of the agency action. Additionally, Thompson Creek must show good reasons for its failure to present the evidence to IDWR for the latter's consideration in the water district formation proceeding. Thompson Creek does not state it is moving to augment on the basis of section 67-5276. It fails to articulate good reasons why it did not submit the documents for IDWR consideration during the proceeding. In addition, Thompson Creek fails to meet the three-pronged test because the proposed documents are immaterial and unrelated to the validity of the agency action. Its motion to augment should accordingly be denied.

A. Thompson Creek's documents were not part of the record below and should not be part of the record on review.

"[J]udicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter (I.C. § 67-5275(1)), supplemented by additional evidence taken pursuant to section 67-5276, Idaho Code." Idaho Code § 67-5277. The Idaho Supreme Court has recently noted the difficulties inherent in the scope of judicial review for district courts but also pointed out that the constraints nonetheless must be followed. In Crown Point, the Idaho Supreme Court explained:

We are sympathetic to the situation faced by the district court – reviewing findings of fact based on an analysis by several individuals of existing documents in the City's

² Notably, Thompson Creek attempts to steer the Court away from this section and instead directs the Court to section 67-5275 of the Idaho Code. Section 67-5275(3) states generally that "[t]he court may require corrections to the record." A more specific statute controls over a general statute where there is any conflict between the two. See Estate of Collins v. Geist, 143 Idaho 821, 153 P.3d 1167, 1173 (2007). Thompson Creek's suggestion that because of the "lack of any detailed standards in this statutory provision [67-5275] ... this Court has broad discretion to correct the record by supplementing it with additional relevant documents" is misleading. Motion, pp. 4-5. More detailed standards are found in section 67-5276, and indeed, section 67-5276 governs Thompson Creek's motion to augment.

possession, but not the existing documents themselves. However, we are constrained by I.C. § 67-5277, which limits judicial review of disputed issues of fact to the agency record.

Crown Point Dev., 2007 WL 936118, at *4. In other words, because the documents at issue were not part of the record considered by IDWR in the water district formation proceeding, those documents should not be included in judicial review of that decision. To determine otherwise would suggest to petitioners that they do not have to present all relevant documents to the agency during the decision-making process because a court may allow the petitioner another opportunity to provide support for its arguments if the petitioner does not like the agency's final decision. The Idaho Supreme Court makes it clear that "[i]n situations where no procedural irregularities before the agency are alleged and the case is heard as an administrative appeal, the hearing must be confined to the record." Clow v. Bd. of County Comm'rs, 105 Idaho 714, 716, 672 P.2d 1044, 1046 (1983) (citations omitted).

This is not the situation in examples where the agency included the wrong document in the record or an incomplete copy of a document it meant to include.³ Certainly, in those examples, a court could *correct* the record pursuant to section 67-5275, Idaho Code. See Petersen v. Franklin County, 130 Idaho 176, 186, 938 P.2d 1214, 1224 (1997). What Thompson Creek proposes, however, is not a correction but a significant augmentation of Exhibits A-I, L-M, O-P, and S-T, which requires it to meet the standards of section 67-5276, Idaho Code, and it has not done so.

B. Thompson Creek has not shown that it had good reason for failing to present the additional evidence to IDWR in the water district formation proceeding or

³ In the present case, IDWR's agreement to include Exhibits J, K, N, Q and R in the agency record corrects the oversight.

that there were any procedural irregularities nor that the additional evidence is material or relates to the validity of IDWR's order.

Thompson Creek's motion to augment should be denied because it fails to satisfy the requisite standard for augmenting an administrative record. Thompson Creek attempts to avoid the three-part test of section 67-5276 by suggesting other more general statutes apply. It fails entirely to address the third prong requiring good reason for its failure to present the documents to IDWR during the proceeding below. It also fails to show the materiality of the documents and fails to show how those documents relate to the validity of the creation of the water district.

1. Thompson Creek wholly fails to satisfy the third prong of section 67-5276 of the Idaho Code.

Thompson Creek failed to state its reasons for failing to produce the documents to IDWR during the water district creation proceeding and did not allege any irregularities in procedure. As mentioned above, and fatal to its motion to augment, Thompson Creek does not rely on section 67-5276, instead relying on more general statutes, which do not require the third and crucial element of the three-part test. Thompson Creek mentions the controlling statute in passing suggesting that it will first attempt to augment via the general statutes, and if that does not work, it will try again pursuant to section 67-5276. Motion, p. 6. Without good reason(s) for its failure to provide the documents at issue to IDWR for consideration during the administrative proceedings, Thompson Creek should not be allowed to augment the record with those documents now. Thus, the record should not be augmented with Thompson Creek's Exhibits A-I, L-M, O-P, S-T.

2. The exhibits are not material or related to the validity of the agency order.

A separate reason for denying Thompson Creek's motion to augment is Thompson Creek's failure to satisfy the other two prongs of section 67-5276. Thompson Creek has not demonstrated the materiality of the documents nor that they are related to the validity of IDWR's order.

Thompson Creek improperly seeks to augment the record with documents related to the Wild and Scenic Rivers Agreement, exhibits A-I, L-M, O-P, because the State of Idaho was a party to a particular subcase in the Snake River Basin Adjudication ("SRBA"). Items of public record, however, do not necessarily become part of the agency record. Crown Point Dev., 2007 WL 936118, at *4. Except for the State's motion for interim administration in the SRBA, other proceedings and subcases of the SRBA are immaterial to IDWR's creation of the water district. The adjudication of Thompson Creek's water rights, those of the United States or the State of Idaho, or any other claimant in the affected basins are not relevant to the formation of the water district except that the water rights ultimately were or will be partially decreed.

The following description of the SRBA provides additional reasons why the above listed documents are irrelevant and do not relate to the validity of IDWR's order. The function of the SRBA is to adjudicate all water rights claims within its jurisdiction. See Walker v. Big Lost Irrigation Dist., 124 Idaho 78, 80-81, 856 P.2d 868, 870-71 (1993). Separate from the SRBA adjudication, IDWR is required by statute to divide the state into water districts for the purpose of administering water rights in the State of Idaho. Idaho Code § 42-604. However, while the SRBA is ongoing, section 42-1417 of the Idaho Code provides for interim administration by IDWR for those basins. Merely because the State of Idaho was a party to an SRBA subcase and received all pleadings in

that subcase does not suggest those subcase pleadings are material evidence in the creation of a water district pursuant to section 42-604. IDWR itself is not a party to any SRBA subcase pursuant to Idaho Code § 42-1401B(3). Those documents sought to be added concern some of the many water rights that will be administered in the newly created district. Yet Thompson Creek characterizes the documents as “critical to understanding the history of the creation of” the water district. Motion, p. 9. Thompson Creek fails, however, to explain how that tangential history relates to the validity of the order. See In re Application for Zoning (Brower v. Bingham County Comm’rs), 140 Idaho 512, 516-17, 96 P.3d 613, 617-18 (2004) (upholding district court’s decision that petitioners were not entitled to present additional evidence on review because, *inter alia*, the documents constituted neither facts relevant to the challenged decision nor related to the validity of the action). The record should not be augmented with these exhibits.

Thompson Creek also seeks erroneously to augment the record with Exhibits S and T, reasoning that because they are similar to the type of documents already in the record that therefore they should be included. Exhibit S is a February 9, 2005, letter from IDWR’s Tim Luke to representatives of certain then-existing water districts in the Upper Salmon River Basin announcing IDWR’s intent to hold public informational meetings regarding the creation of the Upper Salmon Water District and assuring the representatives that their districts will be unaffected in 2005. While Exhibit S does touch on the creation of the water district, the crux of the letter is to inform the representatives of what is going on and what to expect going forward. Similarly, Exhibit T is a June 17, 2005, letter also written by Tim Luke, extending an invitation to certain water users to form a steering committee. The official record does not include these two exhibits;

neither letter was submitted to the Director in connection with the consideration of the proceeding. See Idaho Code § 67-5249. Thompson Creek has not articulated a basis for their inclusion besides similarity. The standard for augmenting pursuant to section 67-5276, however, requires more than mere reference to the decision. The record should not be augmented with these exhibits. Therefore, Thompson Creek's motion to augment should be denied.

C. Thompson Creek's requested relief misapplies the relevant statutes.

Even if Thompson Creek met the three-prongs of section 67-5276 of the Idaho Code, which it did not, the relief suggested by that statute would be to remand to IDWR to consider the new evidence, conduct additional fact-finding and modify its action, if necessary. See Idaho Code § 67-2526(1)(a). Despite that remand remedy explicitly contemplated in section 67-5276, Idaho Code, Thompson Creek's motion to augment improperly attempts to side-step a cornerstone of administrative law, agency decision-making.

Thompson Creek moves to augment under section 67-5275, Idaho Code, requesting the Court make any *corrections* to the record. Motion, pp. 4-6. The documents at issue, however, were not excluded from the record as the result of an agency error that may be corrected by the Court. The documents can only be added to the record through remand to the agency if the Court finds Thompson Creek has satisfied the three-part test of section 67-5276 and that the documents should be part of the record consistent with the Idaho Supreme Court's decision in Crown Point Dev. See 2007 WL 936118, at *4 (vacating the district court's order to augment finding the district court relied on improperly admitted additional evidence to reverse some of the governmental

body's factual findings). See also Petersen, 130 Idaho at 186, 938 P.2d at 1224 (remanding to the agency for additional development of the record). Moreover, the fundamentals of administrative law also suggest remand is the appropriate remedy if the Court finds that augmentation is necessary. In reviewing an agency's decision, a court should not substitute its judgment for that of the agency, especially if the reviewing court finds the agency should consider additional documents. See Idaho Code § 67-5279; Crown Point Dev., 2007 WL 936118, at *4.

Accordingly, if the Court determines that Thompson Creek met its burdens under section 67-5276 and that the record should be augmented, the Court should remand to IDWR to consider the additional evidence, conduct additional fact-finding and modify the decision if needed. Despite Thompson Creek's suggestion to do so, it would be error for the Court to augment the agency record under the guise of *correction* and then review the merits of IDWR's decision.

III. CONCLUSION

For the foregoing reasons, Thompson Creek's Motion to Augment should not be granted except to the extent stipulated to by IDWR in this Response.

RESPECTFULLY SUBMITTED this 10th day of May, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described document(s) on the person(s) listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on this 10th day of May 2007.

Document(s) served: IDWR's Response to Motions to Augment Record and for Extension of Time for Filing Brief

Person(s) served:

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DISTRICT COURT
CUSTER COUNTY
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2007 MAY 14 PM 2:53

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

IN THE MATTER OF CREATING THE
UPPER SALMON RIVER BASIN WATER
DISTRICT (DESIGNATED AS WATER
DISTRICT NO. 170)

Case No. CV-2006-66

THOMPSON CREEK MINING COMPANY,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

**NOTICE OF EXPEDITED TELEPHONIC
HEARING ON MOTION TO AUGMENT
RECORD AND MOTION FOR EXTENSION
OF TIME FOR FILING BRIEF**

PLEASE TAKE NOTICE that petitioner ("TCMC"), by and through undersigned
counsel, will call up for telephonic hearing its Motion to Augment Record and Motion for

**NOTICE OF EXPEDITED HEARING ON MOTION TO
AUGMENT RECORD AND MOTION FOR EXTENSION
OF TIME FOR FILING BRIEF - 1**

BOL_MT2:650013.1

Extension of Time for Filing Brief in the above-captioned Court, before the Honorable Brent J. Moss, on Wednesday, May 16, 2007 at 2:00 p.m. or as soon thereafter as counsel can be heard. Petitioner, TCMC, will initiate the call.

DATED this 14th day of May, 2007.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By



Dylan B. Lawrence – Of the Firm
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Company

**NOTICE OF EXPEDITED HEARING ON MOTION TO
AUGMENT RECORD AND MOTION FOR EXTENSION
OF TIME FOR FILING BRIEF - 2**

BOI_MT2650013.1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May 2007, I caused a true and correct copy of the foregoing **NOTICE OF EXPEDITED HEARING ON MOTION TO AUGMENT RECORD AND MOTION FOR EXTENSION OF TIME FOR FILING BRIEF** to be served by the method indicated below, and addressed to the following:

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